(19)

No. 01-896-CFX Title: Ford Motor Company and Citibank (South Dakota), N.A., Petitioners
v.
John B. McCauley, et al.

Docketed:
December 19, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Dec 19 2001	Petition for writ of certiorari filed. (Response due January 18, 2002)
	Jan 18 2002	Brief of respondents John B. McCauley, et al. in opposition filed.
	Jan 30 2002	DISTRIBUTED for Conference of February 15, 2002
	Jan 31 2002	Reply brief of petitioners Ford Motor Company and Citibank (South Dakota), N.A. filed.
	Feb 19 2002	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT October 7, 2002. **********
	Apr 5 2002	Order extending time to file brief of petitioner on the merits until May 6, 2002.
	May 3 2002	Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed.
	May 6 2002	Joint appendix filed.
	May 6 2002	Brief of petitioners Ford Motor Company and Citibank (South Dakota), N.A. filed.
	May 6 2002	Brief amicus curiae of National Association of Manufacturers filed.
	May 6 2002	Brief amicus curiae of Business Roundtable filed.
	May 6 2002	Brief amicus curiae of Chamber of Commerce of the United States filed.
	May 6 2002	Brief amicus curiae of Product Liability Advisory Council filed.
	May 6 2002	Brief amicus curiae of United States filed.
	May 6 2002	Brief amicus curiae of State Farm Mutual Automobile Insurance Company filed.
	Jun 5 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jun 6 2002	Brief of respondents John B. McCauley, et al. filed.
	Jun 6 2002	Brief amicus curiae of Trial Lawyers for Public Justice filed.
	Jun 21 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 28 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
	Jul 8 2002	Reply brief of petitioners Ford Motor Company and Citibank (South Dakota),N.A. filed.
	Jul 23 2002	CIRCULATED.
	Aug 15 2002	Record filed.
	Sep 13 2002	The parties are directed to file supplemental briefs addressing the following question: "Is there appellate

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Entry	Date	Proceedings and Orders
		jurisdiction when petitioners, as the nominally prevailing party in the district court, appeal the district court's dismissal of a complaint for lack of jurisdiction?" Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, September 26, 2002. Twenty copies of the briefs prepared under Rule 33.2 may be filed initially in order to meet the September 26 filing date. Rule 29.2 does not apply. Forty copies of the briefs prepared under Rule 33.1 are to be filed as soon as possible thereafter.
	Sep 13 2002	Letter of respondent in response to supplemental briefing question.
	Sep 26 2002	Supplemental brief of respondents John B. McCauley, et al. filed.
	Sep 26 2002	Supplemental brief of petitioners Ford Motor Company and Citibank (South Dakota) N.A. filed.
	Oct 7 2002	ARGUED.
	Oct 15 2002	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

Supreme Court, U.S.
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No. 01-____

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the cost to the defendant of complying with an injunction sought by a plaintiffs' class may satisfy the amount-in-controversy requirement of the diversity statute, where such compliance would cost the defendant more than the $75,000 minimum whether it covered the entire class or any single member of the class.

2. Whether, for purposes of applying the amount-in-controversy requirement of the diversity statute, a class action claim for punitive damages should be attributed to each member of the class as an undivided whole, or instead must be apportioned to each class member on a *pro rata* basis.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption and to the unidentified class members, Ricky A. Copeland, Gerald Essig, Howard S. & Lynette M. Hornreich, John La Grou, Jeffrey Scott Merrick, and Thomas Walters are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock. Citibank (South Dakota), N.A. is a wholly-owned subsidiary of Citicorp, and is indirectly wholly-owned by Citigroup, Inc. Citigroup, Inc. is a publicly held company.

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Dobie, Armistead M., *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733 (1925).....10
Fallon, Richard H., Jr. et al., *Hart and Wechsler's The Federal Court and the Federal System* (4th ed. 1996).....10, 15, 16
McInnis, Brittain Shaw, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998).....10

PETITION FOR A WRIT OF CERTIORARI

Petitioners Ford Motor Company and Citibank (South Dakota), N.A. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-20a) is reported at 264 F.3d 952. The opinion of the district court (Pet. App. 23a-33a) is not reported.

JURISDICTION

The opinion of the Court of Appeals was issued on September 6, 2001. The Court of Appeals denied the petition for rehearing and rehearing en banc on October 22, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1332(a)(1) of Title 28, United States Code, provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between . . . citizens of different States . . . ."

STATEMENT OF THE CASE

In *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court held that the advent of the modern class action under Rule 23 failed to alter the traditional rule that "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement" of the diversity statute. 394 U.S. at 335. As the Court explained, however, the claims of multiple plaintiffs may be attributed to the class as an undivided whole where the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Id.*

Because both cases were presented in this Court on the assumption that the plaintiffs alleged "separate and distinct" claims, neither *Snyder* nor *Zahn* elaborates the circumstances in which a claim is properly classified as "separate and distinct" or "common and undivided." And the Court has had no occasion to revisit the issue in the intervening thirty years. The result, the leading treatise in the area explains, is that the "rules relating to aggregating multiple claims to satisfy the amount in controversy requirement are in a very unsatisfactory state," and "the distinction between a common, undivided interest and several and distinct claims is far from clear." 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* ("Wright & Miller") § 3704, at 127, 150 (1998). This case affords the Court the opportunity to provide much-needed guidance on the issue, in the specific context of two recurring situations that have confused and divided the lower courts: a class claim for injunctive relief, and a class claim for punitive damages.

The claim for injunctive relief in this case raises an additional question that has similarly divided the lower courts for years: whether, for purposes of determining the amount in controversy in a diversity suit, a claim may be evaluated not only in terms of its value to the plaintiff or plaintiffs, but, alternatively, in terms of its cost to the defendant. The Court has never conclusively addressed this question, and the lower courts are deeply divided on it. *See* 14B Wright & Miller § 3703. The conflict is particularly confounding in the class action context, where courts must address the issue while also adhering to *Snyder* and *Zahn*. Guidance from the Court on this question is critical, and this case presents an excellent vehicle in which to provide it.

1. This case arises out of the termination of a credit card rebate program operated by Petitioners Ford Motor Company and Citibank (South Dakota), N.A. In 1993, Petitioners issued a credit card that enabled its users to earn rebates towards the purchase of a new Ford vehicle. Pet. App. 3a. Petitioners discontinued the program effective January 1, 1998. In response, cardholders filed six nationwide class actions in the state courts of Washington, Oregon, California, Illinois, Alabama, and New York. *Id.* The suits alleged generally that one or both Petitioners had made misrepresentations concerning the rebate program, and that the program had been wrongfully terminated. *Id.*

Petitioners removed the cases to federal court on the basis of diversity jurisdiction, and then petitioned the Judicial Panel on Multidistrict Litigation for consolidation of the actions in one district court. The Panel transferred the actions to the Western District of Washington for consolidated pretrial proceedings. The named plaintiffs in the various actions then jointly filed a Consolidated Complaint. The Consolidated Complaint stated that the case was within the district court's diversity jurisdiction, *id.* at 4a; it sought as relief, *inter alia*, punitive damages and an injunction reinstating the rebate program for the class members, *id.*; and it alleged that Petitioners' liability to the class amounted to billions of dollars, *id.* at 13a.

Following completion of discovery on the question of class certification, the district court *sua sponte* issued an order to show cause why the Consolidated Complaint "should not be dismissed for lack of jurisdiction," for failure to establish the $75,000 amount-in-controversy requirement. *Id.* at 4a.[1] Two of Petitioners' arguments in response to the court's order are relevant here: (1) that the plaintiffs have a common and undivided interest in the request for an injunction reinstituting the program, and Petitioners' cost of complying with that request exceeds $75,000 even for a single plaintiff; and (2) that the plaintiffs have a common and undivided interest in the request for punitive damages, which also exceeds

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[1] It is undisputed that the Consolidated Complaint satisfies the requirement of complete diversity among the parties. Pet. App. 6a.

$75,000. The district court rejected those arguments and dismissed the Consolidated Complaint for lack of jurisdiction. *Id.* at 4a-5a.

2. The Ninth Circuit affirmed in part and dismissed in part.

a. The panel first addressed Petitioners' contention that the cost of complying with Respondents' request for injunctive relief satisfies the amount-in-controversy requirement. The court did not dispute that it would cost Petitioners more than $75,000 to reinstitute and operate the rebate program. The court also acknowledged that, under the "either viewpoint rule," "the test for determining the amount in controversy is the pecuniary result to *either party* which the judgment would directly produce." *Id.* at 7a (emphasis added). As a result, even if the value of injunctive relief to the plaintiff does not exceed $75,000, the amount-in-controversy threshold still might be satisfied based on "the potential cost to the defendant of complying with the injunction." *Id.* In the court's view, however, the "either viewpoint" rule applies in class actions (and other multiple plaintiff cases) only in circumstances in which the plaintiffs have a "common and undivided interest" in the requested injunction. *Id.* at 9a. If it were otherwise, the court believed, plaintiffs could too easily subvert the non-aggregation principle of *Snyder* and *Zahn*. *Id.*

Here, the court held, the plaintiffs did not possess a "common and undivided" interest in the request for an injunction reinstituting the rebate program. The principal basis for that conclusion was that the right asserted by the plaintiffs —*viz.*, "to accrue rebates under the canceled program"—was "distinct to each plaintiff" and "based on his or her individual contractual relationship with Ford and Citibank." *Id.* at 11a. The court found irrelevant the undisputed fact that the fixed cost to Petitioners of complying with the injunction would exceed $75,000 even as to any *single* plaintiff. *Id.* at 12a. In the court's view, establishing jurisdiction on that basis would

conflict with "the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." *Id.* The court therefore determined that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.*

b. The Ninth Circuit also rejected Petitioners' argument that the plaintiffs' class possesses a common and undivided interest in the request for punitive damages. The court focused on whether "the consolidated plaintiffs and putative class members unite to assert a single title or right." *Id.* at 16a. Claims for punitive damages, the court reasoned, "are brought together in a class action for the convenience of the plaintiffs, not because the plaintiffs share a common and undivided interest in a single, indivisible res." *Id.* at 17a. As a result, the court found, "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct." *Id.* (internal quotation marks omitted). In reaching that conclusion, the court emphasized that a plaintiff's recovery of punitive damages is not limited by prior awards of punitive damages to other plaintiffs for the same act, and also that "[e]ach consolidated plaintiff and class member could bring an individual action for punitive damages and have his or her rights adjudicated without implicating the rights of every other person claiming such damages." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal jurisdiction that have divided and confused the lower federal courts for years, and that are ripe for this Court's review. Both questions concern the scope of federal jurisdiction in diversity cases pursuant to 28 U.S.C. § 1332, and in particular the appropriate methods for assessing in a diversity class action whether "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a).

One of the questions presented—whether the cost to a defendant of complying with a class claim for injunctive relief may satisfy section 1332's amount-in-controversy requirement, where such compliance would cost the defendant more than $75,000 whether it covered the entire class or any single class member—itself implicates a number of connected and important questions warranting this Court's review. The first of these is a question over which the courts of appeals have sharply divided for years: In cases where an injunction is requested, may the amount in controversy be evaluated only by looking at the *value* of the injunction to the plaintiff (the "plaintiff's viewpoint" rule), or may courts also consider the *cost* to the defendant of complying with the injunction (the "either viewpoint" rule)? Relatedly, if the "either viewpoint" rule is appropriate as a general matter, may it be employed in the class action setting without running afoul of the rule announced by this Court in *Snyder* that class members may not aggregate their "separate and distinct" claims to satisfy the amount-in-controversy requirement? The lower courts have diverged markedly in their understanding and application of *Snyder*'s dictates, particularly where injunctive relief and the "either viewpoint" rule are at issue. Moreover, the holding of the Ninth Circuit below that the "either viewpoint" rule cannot be applied consistently with *Snyder* both misconceives the non-aggregation principle and ignores the substantial sum actually at stake in the class claim for injunctive relief in this case. This Court's intervention is warranted to restore consistency and coherence to the law in this area.

The second question presented concerns the treatment of a class claim for punitive damages in the amount-in-controversy determination. In particular, does the class have a "common and undivided" interest in the entire punitive damages award, or does each class member have a "separate and distinct" claim for a *pro rata* share of the punitive damages award? Those panel opinions in the courts of appeals that have analyzed the merits of the question have reached

opposite conclusions, and the district courts are divided. In addition, the position adopted by the Ninth Circuit below and shared by other courts of appeals is decidedly in error: the view of those courts—*i.e.*, that each class member has a "separate and distinct" claim for a *pro rata* (and jurisdictionally insufficient) share of the class-wide punitive damages award—necessarily depends on the unsustainable premise that no class member could obtain $75,000 in punitive damages in an individual action. That erroneously restrictive interpretation of the scope of diversity jurisdiction warrants this Court's immediate correction, especially in view of the Court's repeated expressions of concern with the danger of arbitrarily excessive punitive damages awards against out-of-state businesses.

Finally, the Court should grant the petition in this case because opportunities to review these important issues do not often arise. Under 28 U.S.C. § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Accordingly, the bulk of district court decisions in this area are subject to no appellate review at all. This case is an exception to that rule because, as the court of appeals discussed, the original complaints filed in various state courts and then removed to federal court were replaced by a Consolidated Complaint filed in the district court, and the district court's order dismissed, rather than remanded, the action as defined in that Consolidated Complaint. *See* Pet. App. 5a-6a. Thus, especially because the Court so rarely has the opportunity to review the issues presented here, the petition should be granted.

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE "EITHER VIEWPOINT" APPROACH TO THE AMOUNT-IN-CONTROVERSY REQUIREMENT IN THE CLASS ACTION CONTEXT.

A principal ground of diversity jurisdiction asserted by Petitioners and rejected by the court below is that section

1332's amount-in-controversy requirement is satisfied because the cost to Petitioners of complying with the injunctive relief sought by the plaintiff class—reinstatement of the rebate program and restoration of the opportunity to accrue rebates—would exceed $75,000 even if the requested relief were awarded only to one plaintiff. The Ninth Circuit's rejection of that argument is incorrect on the merits, and it compounds a deep division among the courts of appeals over the appropriate method for evaluating the amount in controversy in class actions seeking injunctive relief.

A. The Ninth Circuit's Decision Compounds an Existing Intercircuit Conflict.

1. In diversity suits where the requested relief includes an injunction against the defendant, a recurring question is whether the amount in controversy must be evaluated by looking only to the value of the case to the plaintiff (the "plaintiff's viewpoint rule"), or whether it may also be determined by considering the cost to the defendant of complying with the requested injunction (the "either viewpoint rule"). The question arises in cases like this one, where complying with the requested injunction would require the defendant to alter its business activities in such a manner that would cost at least the statutory minimum under 28 U.S.C. § 1332, even though the value of the injunction to each individual plaintiff is less than the minimum.

This Court has never conclusively addressed this issue,[2] and the lower courts across the country are deeply divided on it. *See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 218

[2] The Court has, however, approved the use of "compliance costs" when calculating the amount in controversy in related contexts. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977) (holding that, for purposes of satisfying the federal question statute's now-repealed $10,000 threshold, the plaintiffs' "costs of compliance" with the challenged state statute "are properly considered in computing the amount in controversy).

(11th Cir. 1997) ("The Supreme Court has provided no clear guidance on this question, and, as a result, federal courts are divided as to the proper perspective to use in determining the amount in controversy.") (footnote omitted); 14B Wright & Miller § 3703 (discussing the conflict and collecting cases); 15 James Wm. Moore *et al.*, *Moore's Federal Practice* ("*Moore's*") § 102.109 (3d ed. 2001) (same).

On one hand, several courts—including the Second, Third, Fifth, Eighth, and Eleventh Circuits—have adopted the "plaintiff's viewpoint" rule, and consider only the value of the injunction to the plaintiff. *See Ericsson GE Mobile*, 120 F.3d at 219; *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994); *Kheel v. Port N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *Massachusetts State Pharm. Ass'n v. Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970); *Alfonso v. Hillsborough County Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962). On the other hand, a growing number of courts—including the First, Fourth, Seventh, Tenth, and D.C. Circuits, along with the Ninth Circuit in some circumstances as discussed below—disagree, and hold instead that the amount-in-controversy requirement may be satisfied by evaluating the case from either the plaintiff's or the defendant's viewpoint. *See Justice v. Atchison, Topeka & Santa Fe Ry.*, 927 F.2d 503, 505 (10th Cir. 1991); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978); *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969); *Government Employees Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964); *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944); *see also Crosby v. America Online, Inc.*, 967 F. Supp. 257, 264 (N.D. Ohio 1997). In total, almost all the courts of appeals have weighed in on the "viewpoint" issue, and the result is a roughly even split among the circuits that is clearly ripe for resolution by this Court.[3]

[3] Scholarly opinion is also divided. The "plaintiff's viewpoint" rule has enjoyed notable academic support in the past, *see, e.g.*, Armistead M.

2. This disagreement is further complicated in the class action context, where the courts are divided over whether, and how, the "either viewpoint" rule can be applied consistent with *Snyder*. Here, the court of appeals observed that the "either viewpoint" rule has long been the law of the Ninth Circuit. Pet. App. 7a (citing *Ridder*, 142 F.2d at 399). But the court refused to apply that rule in the class action context of this case, on the ground that to do so would run afoul of the principle articulated in *Snyder* that individual class members may not aggregate their separate and distinct claims to meet section 1332's jurisdictional threshold. *Id.* at 11a-12a.

Several courts agree with the Ninth Circuit's identification of an "inherent conflict between the 'either viewpoint' rule and [*Snyder*'s] non-aggregation rule," Pet. App. 8a (citing *Snow v. Ford Motor Co.*, 561 F.2d 787, 788-91 (9th Cir. 1977)), and conclude therefore that the former may never be employed in cases involving "separate and distinct" claims. Courts taking this view tend to understand the "either viewpoint" approach as necessarily involving a process of aggregation, whereby the separate costs to the defendant of complying with injunctions for each individual plaintiff are added together to determine the total burden on the defendant. Unless the plaintiff class asserts a "common and undivided" claim, these courts reason, such aggregation is impermissible under *Snyder*. *See, e.g.*, *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir.) ("[A]llowing the amount in controversy to be measured by the defendant's cost would eviscerate *Snyder*'s holding that the claims of class members may not be aggregated in order to meet the jurisdictional

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Dobie, *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733 (1925), but contemporary scholarly opinion tends to favor the "either viewpoint" approach, *see, e.g.*, 14B Wright & Miller § 3703, at 121-25; Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Court and the Federal System* ("*Hart & Wechsler*")1550 (4th ed. 1996); Erwin Chemerinsky, *Federal Jurisdiction* § 5.3.4 (2d ed. 1994); Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998).

threshold."), *cert. denied*, 510 U.S. 964 (1993); *Massachusetts State Pharm. Ass'n*, 431 F.2d at 132 & n.2 (concluding that, for class actions, *Snyder* "can only be interpreted as precluding the valuation of the amount in controversy from the defendant's viewpoint. To hold otherwise would in effect permit aggregation of claims contrary to the teaching of *Snyder*."); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970) (equating the "either viewpoint" approach with looking to the "total detriment" to the defendant, and holding that, in cases which involve "separate and distinct claims that cannot be aggregated, it would be improper to look to total detriment").[4]

Other courts reject that approach and instead harmonize the "either viewpoint" rule with the *Snyder* non-aggregation principle even where the plaintiffs' claims are "separate and distinct." In *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998), for example, the Seventh Circuit acknowledged the "[c]oncern . . . that if the cost to the defendant may be used to establish the minimum amount in controversy in [a class action] injunction case, . . . the nonaggregation rule will be circumvented." *Id.* at 610. Writing for the court, Judge Posner explained that this concern is "misplaced," because evaluating a claim for injunctive relief from the defendant's viewpoint need not mean examining the *total* cost to the defendant of complying with the injunction for the *entire* plaintiff class. *Id.*

Rather, the Seventh Circuit applied the "either viewpoint" rule together with *Snyder* and concluded that the correct standard is "the cost to each defendant of an injunction running in favor of one plaintiff." *Id.* In that context, application of the "either viewpoint" rule means that "[t]he defendant . . . is deemed to face multiple claims for injunctive re-

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[4] Of course, courts that reject the "either viewpoint" rule even in single-plaintiff cases, *see supra* p. 9, necessarily reject it in this context also.

lief, each of which must be separately evaluated." *Id.*; *accord Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977-78 (7th Cir. 2000). A number of other courts follow this approach. *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 n.16 (D. Md. 2001) ("Of course, the cost to the defendant of an injunction running in favor of one plaintiff will often be used as the test to determine the amount in controversy in class actions and other multi-plaintiff cases."); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 834-35 (E.D. Mich. 1999) (adopting the *In re Brand Name* approach); *see also McCoy v. Erie Ins. Co., et al.*, 147 F. Supp. 2d 481, 494 n.14 (S.D. W. Va. 2001); *Kivikovski v. Smart Prof'l Photocopying Corp.*, No. 00-524-B, 2001 WL 274763, at *2 (D.N.H. Feb. 20, 2001); *Crosby v. America Online, Inc.*, 967 F. Supp. at 265.

3. In this case, the Ninth Circuit purported to agree with the Seventh Circuit's general approach in *In re Brand Name*. It first observed that, in cases where the plaintiffs assert a "common and undivided" interest in a particular benefit, the cost to the defendant of complying with an injunction vindicating that entire interest (*i.e.*, the "total detriment" referred to in cases cited *supra* pp. 10-11) may be used to satisfy the amount-in-controversy requirement. Pet. App. 9a. The court further noted that, where the claims at issue are "separate and distinct," the amount-in-controversy requirement may be satisfied by looking at "the cost to the defendant of an injunction running in favor of one plaintiff." *Id.* (citing *In re Brand Name*, 123 F.3d at 610).

Ultimately, however, the Ninth Circuit created a new exception to this latter principle. After acknowledging that, in this case, "the cost of an injunction running in favor of one plaintiff would exceed $75,000," *id.* at 12a, the court concluded that premising diversity jurisdiction on that ground would be "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court," *id.* Having interposed that

new principle into the analysis, the Ninth Circuit determined categorically that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.* That holding conflicts directly with *In re Brand Name* and its progeny, and also implicates the broader intercircuit division over the propriety of ever using the "either viewpoint" rule to evaluate the amount in controversy. The conflict is confirmed by a subsequent decision of the Ninth Circuit issued only four days after the decision in this case, where the court expressly rejected a party's reliance on *In re Brand Name*. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001).

In sum, the Ninth Circuit's treatment of the "either viewpoint" rule deepens the division among the courts of appeals over the viability of that rule, and its rejection of the *In re Brand Name* approach compounds the confusion—even among those courts that generally apply the "either viewpoint" rule—over whether, and how, to apply the rule in the class action context while also abiding by the *Snyder* nonaggregation principle. These conflicts show no sign of abating; they breed confusion over matters of recurring concern to the lower federal courts; and they require conclusive resolution by this Court. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment) (observing that "clear, bright-line" jurisdictional rules "ensure[] that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction").

B. The Ninth Circuit Misconstrued Both the "Either Viewpoint" Rule and the Dictates of *Snyder*.

The Ninth Circuit's treatment of the cost-of-compliance issue is also seriously flawed on the merits. This Court's review is warranted both to clarify the proper application of the "either viewpoint" rule in the class action context, and to dispel some of the confusion in the lower courts concerning the dictates of *Snyder*.

1. The "either viewpoint" rule is the appropriate device for evaluating claims for injunctive relief in the class action context, even when the claims at issue are "separate and distinct."

As a general matter, it is "desirable" to permit section 1332's amount-in-controversy requirement to be satisfied by either the value of the claim to the plaintiff or the cost of the claim to the defendant, since "the purpose of a jurisdictional amount in controversy requirement—to keep trivial cases away from the federal court system—is satisfied when the case is worth a large sum of money to either party." 14B Wright & Miller § 3703, at 121, 124; *accord* 15 *Moore's* § 102.109[4], at 102-200 ("Because the jurisdictional amount was enacted primarily to measure substantiality of the suit, the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose."). As noted above, *see supra* p. 9, a substantial number of the lower courts take this approach at least in single-plaintiff cases.

The situation is somewhat more complicated in the class action context, in light of the non-aggregation principle articulated in *Snyder*. Under that rule, class members may not aggregate their "separate and distinct" claims in order to meet section 1332's amount-in-controversy threshold. *See Snyder*, 394 U.S. at 335. To hold otherwise, the Court in *Snyder* observed, "would seriously undercut the purpose of the jurisdictional amount requirement," in that any sufficiently large plaintiff class could collectively satisfy the jurisdictional threshold even though their individual claims were each worth very little. *Id.* at 340. The same principle necessarily applies when evaluating claims for injunctive relief based on the defendant's cost of compliance: If the claims are "separate and distinct," then the total cost to the defendant of complying with an injunction for all plaintiffs cannot be used to satisfy the amount-in-controversy requirement. As the court below recognized, a contrary rule would allow "plaintiffs with minimal damages . . . [to] dodge the non-aggregation rule by praying for an injunction." Pet. App. 9a.

But the obverse is surely true as well. Just as the non-aggregation rule ensures that class action joinder does not create federal jurisdiction where it would not otherwise exist, *see Gibson v. Shufeldt*, 122 U.S. 27, 30 (1887) ("joinder . . . does not enlarge [federal] jurisdiction"), a proper application of *Snyder* should not *eliminate* federal jurisdiction over claims for injunctive relief that, if brought individually and evaluated with the "either viewpoint" rule, *would* satisfy the jurisdictional threshold. Rather, as the Seventh Circuit in *In re Brand Name* explained, courts may evaluate separate and distinct claims for injunctive relief from the defendant's perspective without running afoul of *Snyder* by examining whether "the cost to [the] defendant of an injunction running in favor of *one plaintiff*" would meet the threshold amount. 123 F.3d at 610 (emphasis added); *see also* cases cited *supra* p. 12. This approach retains the virtues of the "either viewpoint" rule by recognizing that the potential cost to the defendant is a "critical" expression of the amount at stake in a case. *Hart & Wechsler* at 1550. At the same time, it preserves the integrity of the amount-in-controversy requirement as demanded by the *Snyder* non-aggregation principle. *See* Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What Is the Value of Injunctive Relief?* 6 Geo. Mason L. Rev. 1013, 1045-46 (1998).

In this case, uncontested record evidence establishes that the fixed cost to Petitioners of complying with an order providing the injunctive relief sought by the plaintiff class—reinstatement of the rebate program and restoration of the opportunity to accrue rebates—would far exceed the jurisdictional minimum of $75,000, even if the relief were awarded

only to a single plaintiff.[5] The Ninth Circuit acknowledged this fact, noting that "the cost of an injunction running in favor of one plaintiff would exceed $75,000," and that, indeed, "the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million." Pet. App. 12a. Assuming *arguendo* that the plaintiffs in this case present "separate and distinct" claims for injunctive relief,[6] these facts are sufficient under the "either viewpoint" rule as applied by *In re Brand Name* and its progeny to satisfy section 1332's amount-in-controversy requirement.

The Ninth Circuit, however, categorically rejected the approach taken by the Seventh Circuit and other courts, asserting without explanation that the approach is "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." Pet. App. 12a. Yet the court nowhere explained what constitutes a "small diversity suit" in its estimation, or how this case could possibly constitute such a suit. In fact, *In re Brand Name* and its progeny provide a method for taking account of the substantial sums actually at stake in this case, and the Ninth Circuit's rejection of that method led it to ignore a "critical" expression of the case's value. *Hart & Wechsler* at 1550.

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5 Because no individual plaintiff could be entitled to anything more than the *opportunity* to accrue rebates—as distinct from an award of any fixed dollar amount—the cost of establishing the business apparatus for tracking the accrual of rebates, maintaining the computer systems for identifying purchases that qualify for rebate accrual, and paying the salaries of persons operating the rebate program will arise if the requested injunction is awarded to even a single plaintiff.

6 As discussed *infra* pp. 17-19, the request for injunctive relief in this case can be understood as a claim based on a "common and undivided" interest among all members of the plaintiff class. But the case clearly satisfies section 1332's amount-in-controversy requirement even if it is deemed to present "separate and distinct" claims.

The Ninth Circuit appears to have been concerned to avoid a rule under which "'every case, however trivial, against a large company would cross the threshold.'" Pet. App. 12a (quoting *In re Brand Name*, 123 F.3d at 610). But proper application of the "either viewpoint" rule as outlined in *In re Brand Name* would not yield that result. The concern in this area is that "a defendant's clerical or ministerial costs of compliance [with a requested injunction] might carry a case across the threshold." *In re Brand Name*, 123 F.3d at 610. The costs associated with the injunction sought here, however, are more than merely "clerical" or "ministerial." In order to comply with the injunction sought by the plaintiff class in this case, Petitioners Ford and Citibank would have to reinstate the rebate program by reestablishing the business apparatus for tracking the accrual of rebates, maintaining computer systems for verifying which purchases qualify for rebate accrual, and paying the salaries of individuals engaged in the operation of the rebate program. Taking account of such structural and operational costs hardly risks opening the federal courts to a flood of trivial litigation. *See In re Brand Name*, 123 F.3d at 610 (contrasting costs requiring the defendant to "restructure its business or give up a lucrative lawful business opportunity" with "clerical or ministerial costs of compliance").

2. The requested injunction in this case is better understood as a "common and undivided" claim under *Snyder*.

As noted, the *Snyder* non-aggregation principle applies only to claims that are "separate and distinct," and does not apply to claims asserting "common and undivided" interests in a particular right or benefit. 394 U.S. at 335. Indeed, a rule about aggregation makes no conceptual sense when applied to common and undivided claims, because such claims cannot be *dis*aggregated in the first place. Accordingly, where plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest," *id.*, the

value of the entire claim may be considered for purposes of section 1332's amount-in-controversy requirement. As the Ninth Circuit correctly observed, *see* Pet. App. 9a, this principle applies with equal force to common and undivided claims for injunctive relief that are evaluated in terms of their cost to the defendant. The court failed to recognize, however, that the plaintiffs' request for injunctive relief in this case is better understood as asserting a "common and undivided" interest.

Here, it is undisputed that the "fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million." *Id.* at 12a. That is, the class claim for injunctive relief seeks a single result—reinstatement of the rebate program—and the cost and nature of providing that result does not depend on the number of plaintiffs seeking it. This fixed compliance cost is a hallmark of a claim asserting a "common and undivided" interest. *See, e.g., In re Cardizem Antitrust Litig.*, 90 F. Supp. 2d at 836 ("Plaintiffs seek injunctive relief that will benefit the class as a whole. Defendants' costs of compliance do not depend upon the size of the class or the identity of its members. Accordingly, it is based upon a common and undivided interest and constitutes an integrated claim."); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 483 (M.D.N.C. 1998) ("[B]ecause the defendant will sustain this loss even if only one plaintiff were to obtain the injunction, this is a case where plaintiffs have an undivided interest in the injunction . . . .").

In this sense, the same facts that satisfy the amount-in-controversy standard under the *In re Brand Name* approach to "separate and distinct" claims also establish that the claim here is "common and undivided." Because Petitioners cannot comply with the injunction for a single plaintiff without also incurring the expense necessary to comply with the injunction for the entire plaintiff class, and because that expense far exceeds the jurisdictional minimum under section

1332, the amount-in-controversy threshold is met whether the claims at issue are understood to be "separate and distinct" or "common and undivided." *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d at 719 n.16 ("[I]n a case such as this where an injunction in favor of a single plaintiff—compliance with which would cost the defendant in excess of the jurisdictional amount—would provide the same benefit to all other plaintiffs, the [*In re Brand Name*] test yields a result consonant with the purpose of the common and undivided interest exception.").

II. THE COURT SHOULD DECIDE THE PROPER TREATMENT OF A CLASS CLAIM FOR PUNITIVE DAMAGES IN THE AMOUNT-IN-CONTROVERSY DETERMINATION.

"Punitive damages pose an acute danger of arbitrary deprivation of property," this Court has explained, because "juries [may] use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda v. Oberg*, 512 U.S. 415, 432 (1994).[7] Those circumstances—cases involving substantial sums and the potential for bias against a nonresident business—present a textbook case for the exercise of diversity jurisdiction. That is especially so in a class action, where claims for punitive damages frequently seek staggering amounts. Because out-of-state defendants almost invariably attempt removal to federal court in those circumstances, scores of lower courts have addressed whether a class action seeking punitive damages is an action where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). The substantial

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[7] *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality) (discussing risk that punitive damages award may be "influenced by prejudice against large corporations", and emphasizing that risk is "of special concern when the defendant is . . . a nonresident"); *id.* at 493 (O'Connor, J., dissenting) ("temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong" in cases involving claim for punitive damages).

sums necessarily involved might suggest that class claims for punitive damages readily satisfy the amount-in-controversy requirement. But the issue has generated substantial confusion, with most courts adopting the opposite view.

This Court should resolve the issue not only because it is important and has generated confusion in the lower courts, but also because the view adopted by the Ninth Circuit below and shared by other courts of appeals is demonstrably in error. If, as is surely the case here, an individual plaintiff could bring a separate action for punitive damages in excess of the jurisdictional minimum of $75,000, the joinder of that plaintiff's claim with others in a class action cannot somehow extinguish federal jurisdiction over the claim. But that is exactly the result of the opinion below. The *Snyder* non-aggregation principle, contrary to the view of the Ninth Circuit, in no way compels that outcome: that rule bars aggregation of jurisdictionally *insufficient* claims; it does not require *dis*aggregation of jurisdictionally *sufficient* claims.

A. The Treatment of Punitive Damages Under the Amount-In-Controversy Requirement Is an Important and Recurring Issue That Has Confused and Divided the Lower Federal Courts.

The lower courts are confused and divided over the proper treatment of punitive damages in the amount-in-controversy determination. The wide swings reflected in recent decisions addressing the subject in the Fifth and Eleventh Circuits illustrate the confusion, and also mark out the opposing positions. In *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), the Fifth Circuit held that a class claim for punitive damages was a joint claim manifesting a common and undivided interest. That conclusion hinged on the "unique nature" of punitive damages. *Id.* at 1333. The court explained that Mississippi followed the "almost unanimous rule" concerning the purpose of punitive damages, *viz.*, that punitive damages served "to protect society by punishing and deterring wrongdoing" rather than to compensate an individ-

ual plaintiff. *Id.* The court concluded that punitive damages therefore "are fundamentally collective," and that "each plaintiff has an integrated right to the full amount of the award." *Id.* at 1333-34. As a result, the court found, "the full amount of alleged" punitive damages should "be counted against each plaintiff in determining the jurisdictional amount." *Id.* at 1333.

Just three years later, however, a separate panel of the Fifth Circuit limited *Allen* to the "peculiar nature of Mississippi law," *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998), and did so notwithstanding that Louisiana law (which was at issue in *Ard*) mirrored Mississippi law in treating punitive damages as intended to further the collective interests of society rather than the particular interests of any individual plaintiff. *See, e.g., Duhon v. Conoco, Inc.*, 937 F. Supp. 1216, 1220 (W.D. La. 1996). The panel in *Ard* based its retreat from *Allen* on a 20-year-old decision involving Alabama law, a decision that, while simply containing no analysis of whether punitive damages represent a common and undivided interest, was deemed prior panel precedent on the issue. *See Ard*, 138 F.3d at 602 (relying on *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978)).[8] Subsequently, another panel of the Fifth Circuit appeared to suggest—again on the basis of the prior panel decision in *Lindsey*—that *Allen* was no longer binding in any circumstances, even a case involving Mississippi law. *See H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 214

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[8] The two-page decision in *Lindsey* finds a lack of subject matter jurisdiction based on the failure of the complaint to allege the number of persons in the class, "an allegation that would have permitted the court to ascertain what dollar amount represents the 'amount in controversy' for each member of the class." 576 F.2d at 595. Although the complaint sought both compensatory and exemplary damages, the opinion contains no analysis—and there is no indication that the court was confronted with the question—whether the request for exemplary damages implicated a common and undivided interest.

(2001). But in its later opinion denying rehearing, the panel in that case acknowledged that *Allen* remains binding in cases involving Mississippi law. *See H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 250 F.3d 302, 304-05 (5th Cir. 2001).[9]

The decisions of the Eleventh Circuit follow a similarly confused course. Initially, a panel of that court concluded—largely on the basis of the reasoning in *Allen*—that punitive damages represent a common and undivided interest under Alabama law for purposes of satisfying the amount-in-controversy requirement. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357-59 (11th Cir. 1996). A subsequent panel decision found that Florida law, like Alabama law, permits awards of punitive damages for the "collective good," and that a claim for punitive damages under Florida law thus should be attributed on an undivided basis to each member of the plaintiff class. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999). But the panel reversed its position on rehearing, not because it had reconsidered the merits of the question, but because *Lindsey* (which had been decided prior to the division of the Fifth Circuit and so was binding in the Eleventh Circuit) had been brought to its attention. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir.), *cert. denied*, 531 U.S. 957 (2001); *see also Smith v. GTE Corp.*, 236 F.3d 1292 (11th Cir. 2001) (relying on prior panel precedent rule to embrace *Lindsey*).

Thus, both the Fifth and Eleventh Circuits, when asked to address the issue squarely for the first time, determined that a class possesses a common and undivided interest in punitive damages where state law treats punitive damages as intended to serve societal interests in deterrence and retribution. And the Fifth Circuit's decision in *Allen* remains bind-

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9 The Fifth Circuit has declined to consider the issue en banc when presented with the opportunity. *See H&D*, 250 F.3d at 306-07; *Ard v. Transcontinental Gas Pipe Line Corp.*, 145 F.3d 361 (5th Cir. 1998).

ing in at least certain situations. No other decision in either court, including the 20-year old opinion in *Lindsey*, purports to reject—or even to address—the merits of the conclusion in *Allen*.

But five other courts of appeals, including the Ninth Circuit in the decision below, have reached a contrary determination on the merits of the issue. *See Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 766 (8th Cir. 2001); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292-93 (10th Cir. 2001); *In re Brand Name*, 123 F.3d at 608-09; *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997). District courts outside of those circuits, meanwhile, have issued conflicting opinions. Some continue to find that claims for punitive damages represent a common and undivided interest. *See, e.g., Durang v. Servicemaster Co. Trugreen, Inc.*, 147 F. Supp. 2d 744, 751 (E.D. Mich. 2001); *Knauer v. Ohio State Life Ins. Co.*, 102 F. Supp. 2d 443, 449 (N.D. Ohio 2000). Others have sided with the opinion below. *See, e.g., Mattingly v. Hughes Elecs. Corp.*, 107 F. Supp. 2d 694, 697 (D. Md. 2000); *Lauchheimer v. Gulf Oil*, 6 F. Supp. 2d 339, 346-47 (D.N.J. 1998).

In short, most courts of appeals have now addressed the proper treatment of a class claim for punitive damages in the amount-in-controversy determination, the lower federal courts remain divided, and little would appear to be gained by awaiting further percolation of the issue. The question merits this Court's review.[10]

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10 Even assuming the Fifth and Eleventh Circuits could be said to have come into alignment with the other courts of appeals, the question presented implicates much more than a mere intra-circuit conflict. That is so for several reasons: the disagreement among those court of appeals decisions that actually address the *merits* of the issue presented; the remaining vitality of *Allen* in certain applications in the Fifth Circuit; the continued division among the district courts; the important and recurring nature of the question; and the absence of any apparent benefit from allowing its further percolation. It bears noting that this Court has granted certiorari on a number of occasions even to resolve an intra-circuit conflict where

B. The Ninth Circuit Erred in Concluding That the Class Plaintiffs' Request for Punitive Damages Should Be Apportioned Among the Class Members on a *Pro Rata* Basis.

The Court also should grant review because the view adopted by the Ninth Circuit below—and held by the other courts of appeals—is demonstrably in error, and is incompatible with this Court's decisions. The decision below finds that each plaintiff in the class possesses a "separate and distinct claim" for punitive damages in an amount below the jurisdictional minimum. But as the Fifth and Eleventh Circuit opinions addressing the merits of the question correctly reason, *see Allen*, 63 F.3d at 1332-35; *Tapscott*, 77 F.3d at 1357-59, the "collective" nature of a punitive damages award compels the conclusion that punitive damages should be attributed as an undivided whole to each member of the class.

1. The contrary conclusion of the Ninth Circuit below rests on the court's assumption that "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victim's [sic] of the defendant's misconduct." Pet. App. 17a (internal quotation marks omitted). That statement fundamentally misconceives the nature and purpose of punitive damages. In contrast to compensatory damages, which by definition vindicate individual rights, punitive damages are recognized in almost all jurisdictions to further general societal interests in punishing and deterring unlawful conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) ("under the law of most States, punitive damages are imposed for purposes for retribution and deterrence"); *City of Newport v. Fact Concerts, Inc.*, 453

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the question is an important one. *See, e.g.*, *Dickinson v. Petrolum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939).

U.S. 247, 266-67 (1981).[11] By their very nature, then, punitive damages serve "collective" rather than "individual" interests. *See Allen*, 63 F.3d at 1332-33.[12]

Punitive damages not only are collective in their nature, but they also exhibit the central characteristics of a "common and undivided" interest in their operation. As this Court has explained, for instance, a common and undivided claim exists where a plaintiff "recover[s] a portion of a common fund to be distributed among the claimants," rather than an "amount due to himself on his own separate contract." *Shields v. Thomas*, 58 U.S. (17 How.) 3, 5 (1855); *accord Davies v. Corbin*, 112 U.S. 36, 40-41 (1884) (finding "common and undivided interest" among plaintiffs seeking to "compel a tax collector to collect a single tax . . . for the purpose of distribution among all the creditors").[13] Here, because all class members share a common interest in an award of punitive damages, and because each plaintiff simply recovers a *pro rata* share of the eventual class-wide award, a class claim for punitive damages fits squarely in the category of a "common fund to be distributed among the claimants." *Shields*, 58 U.S. at 5. The amount in controversy, it follows, is the class-wide award, not the *pro rata* distribution. *See id.* at 4-5 ("matter in controversy" is "the sum due to the representatives . . . collectively, and not the particular sum to which

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[11] That is the case under the laws of New York and South Dakota, *see Sharapata v. Town of Islip*, 437 N.E.2d 1104, 1107 (N.Y. 1982); *Veeder v. Kennedy*, 589 N.W.2d 610, 622 (S.D. 1999), the particular states whose laws are alleged by Respondents to control here. *See* Pet. App. 31a.

[12] Accordingly, in some states, a portion of any award of punitive damages accrues to the state treasury. *See, e.g.*, Ga. Code § 51-12-5.1(e)(2) (75% of recovery flows to the State).

[13] The belief of the Ninth Circuit below and of other courts of appeals that it is "irrelevant" that an award of punitive damages in a class action functions as "a single pool of recovery to be allocated among multiple plaintiffs," Pet. App. 16a-17a (quoting *Gilman*, 104 F.3d at 1430), is in direct conflict with this Court's decisions.

each was entitled, when the amount due was distributed among them"); *Davies*, 112 U.S. at 41 ("value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided").

Perhaps the characteristic that most clearly confirms the existence of a "common and undivided" claim is that the defendant has no stake in the ultimate distribution of the award among the plaintiffs. *See, e.g.*, *Texas & Pac. Ry. Co. v. Gentry*, 163 U.S. 353, 363 (1896); *Handley v. Stutz*, 137 U.S. 366, 369 (1890); *Gibson*, 122 U.S. at 30; *Davies*, 112 U.S. at 41; *Shields*, 58 U.S. at 5. The "test," this Court has clarified, "is whether [the plaintiffs] claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party." *Gibson*, 122 U.S. at 30. When confronted with a class claim for punitive damages, of course, a defendant has "no interest in" the "apportionment or distribution" of any award among the plaintiffs. *Id.* Nor do the class members claim a specific share of punitive damages as a "separate and distinct right[]" of their own, "each of which is contested" by the defendant." *Id.* The emphasis instead is on measuring the defendant's wrongdoing generally and on the size of award required to punish and deter the defendant's conduct, *see Allen*, 63 F.3d at 1333, not on circumstances unique to any individual plaintiff. *See Shield*, 58 U.S. at 5 (where plaintiff's claim is "separate and distinct," his recovery "rests altogether on its own evidence and merits," but where claim is common and undivided, "recovery . . . depend[s] upon recovery by others" in "the common fund").

Finally, an "identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983). That principle applies with full force to a class claim for punitive damages. If one member of the class opts out of

participating in the action, the overall class-wide recovery against the defendant remains constant, with the remaining plaintiffs therefore increasing their respective shares of the award. For that and the other explained reasons, class plaintiffs share a common and undivided interest in obtaining an award of punitive damages; and the relevant amount in controversy under the diversity statute is the amount of the class-wide award, not the eventual *pro rata* distribution.

2. The Ninth Circuit below, adhering to the leading court of appeals opinion on the issue, expressed concern that finding each class member to possess a common and undivided interest in punitive damages would "'eviscerate the holdings of *Snyder* and *Zahn*.'" Pet. App. 17a (quoting *Gilman*, 104 F.3d at 1431). That reasoning is entirely circular. In *Snyder* and *Zahn*, the Court *presupposed* that each class member's claim was "separate and distinct," and barred aggregation of jurisdictionally insufficient "separate and distinct" claims for purposes of establishing the amount in controversy. The issue presented here does not implicate the prohibition against aggregating "separate and distinct" claims. Instead, the question is an antecedent one: whether class claims for punitive damages are "separate and distinct" in the first place. The opinion below effectively assumes that question away.

The deeper flaw at the heart of the opinion below is the assumption that each class member's claim for punitive damages not only is "separate and distinct," but also is *for less than the jurisdictional minimum* and therefore would require aggregation with other claims to satisfy the amount-in-controversy requirement. It of course is true, as the Ninth Circuit observed below, that each "class member could bring an individual action for punitive damages." *Id.* But the critical point is that an individual class member's claim for punitive damages, if brought separately, would certainly (and substantially) exceed $75,000. After all, any one plaintiff who brought suit separately could seek the entire amount

necessary to punish and deter the defendant's unlawful conduct. *See, e.g.*, *BMW*, 517 U.S. at 568. At the very least, the individual's punitive damages recovery would approach the amount sought by the class: the measure of punitive damages turns on the reprehensibility of the defendant's conduct, including the aggregate harm caused by the defendant. *See id.* at 574, 576-77; *TXO*, 509 U.S. at 460. When plaintiffs join together to pursue punitive damages as a class, therefore, they simply pursue that same award collectively on a common and undivided basis. *See Davies*, 112 U.S. at 41 (finding common and undivided interest where "*each relator* has the right to have the *whole tax* collected for the purpose of distribution among" them) (emphasis added).

Properly understood, then, the class members here do not seek to aggregate jurisdictionally insufficient claims, as the Ninth Circuit below erroneously presumed. Instead, they seek to assert collectively claims for punitive damages that, if brought individually, would easily satisfy the amount-in-controversy requirement. Those circumstances do not implicate the long-settled purpose of the non-aggregation rule—to ensure that joinder does not create federal jurisdiction over jurisdictionally insufficient claims. *See, e.g.*, *Gibson*, 122 U.S. at 30. In fact, the effect of the opinion below is to hold that joinder somehow *destroys* federal jurisdiction over jurisdictionally *sufficient* claims. Far from being necessary to avoid "eviscerat[ing] the holdings of *Snyder* and *Zahn*," Pet. App. 17a, then, the decision below stands the non-aggregation principle on its head. This Court should grant review to correct the erroneous rule in several courts of appeals that class claims for punitive damages fail to involve a "common and undivided interest," a rule at odds with this Court's decisions and with the premise of the non-aggregation principle.[14]

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[14] Both questions presented in this case are related to the questions presented in a petition currently pending in a separate case, *DaimlerChrysler Corp. v. Gibson*, No. 01-688 (petition filed Nov. 9, 2001). One of the questions in that case is substantially the same as the punitive damages question presented here. The other is a question the Court attempted unsuccessfully to resolve two years ago: whether 28 U.S.C. § 1367 supersedes the requirement of *Zahn* that each member of a plaintiff class in a diversity case must individually satisfy section 1332's amount-in-controversy requirement. If the Court decides to grant the petition in *DaimlerChrysler* as to one or both of the questions there presented, the relationship between the issues in that case and those presented here would provide additional reason to grant this petition.

If the Court decides to grant the petition in *DaimlerChrysler* with respect at least to the punitive damages question, then it should grant review of at least that part of this petition and consider the two cases together. Alternatively, the Court should hold this petition pending the disposition of *DaimlerChrysler*.

If the Court grants review of the 1367/*Zahn* issue in *DaimlerChrysler*, the questions presented here will be critical whether the Court holds that *Zahn* still controls or that section 1367 supersedes *Zahn*. If the Court holds that *Zahn* still controls, then the questions presented in this case will continue to be central to evaluating the amount in controversy in claims for injunctive relief and for punitive damages. Alternatively, if the Court holds that section 1367 supersedes *Zahn*, either of the jurisdictional theories advocated here will be sufficient to establish jurisdiction over the claim of any single class member: the cost of complying with an injunction in favor of any one plaintiff would exceed $75,000, and the punitive damages claim would be worth far more than $75,000 if brought by only one plaintiff. With the amount-in-controversy requirement thus met for a single plaintiff, the rest of the class could be brought along under section 1367's supplemental jurisdiction without regard to the value of their claims. Accordingly, the Court should review the questions presented here in tandem with the 1367/*Zahn* issue in *DaimlerChrysler* if the Court grants review of that issue, or should at least hold this petition pending resolution of the 1367/*Zahn* issue.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending its disposition of the petition, and its possible decision on the merits, in *DaimlerChrysler v. Gibson*, No. 01-688.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A., Cardholder Rebate Program Litigation

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JOHN B. MCCAULEY *et al.*,

Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, *et al.*,

Defendants.

Nos. 99-36115, 99-36206
(Consolidated)
[Filed Sept. 6, 2001]

[Reported at 264 F.3d 952]

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Appeal from the Decision of the United States District Court for the Western District of Washington; William L. Dwyer, District Judge, Presiding. D.C. Nos. MD-98-01199-WLD, CV-97-01293-WLD, CV-98-00151-WLD, CV-98-00152- WLD, CV-98-00153-WLD, CV-98-00226-WLD.

Before: BROWNING, WALLACE, and T.G. NELSON, Circuit Judges.

WALLACE, Circuit Judge:

Ford Motor Company (Ford) and Citibank (South Dakota), N.A. (Citibank) appeal from the district court's order dismissing the consolidated complaint of several underlying state court lawsuits under 28 U.S.C. § 1332 for lack of subject matter jurisdiction, and remanding these state suits to the courts from which they were removed. We must decide two questions. First, whether the minimum amount in controversy required to maintain a diversity suit in federal court ($75,000) is present in the consolidated action. We have jurisdiction under 28 U.S.C. § 1291 to review the district court's order dismissing the consolidated complaint for lack of subject matter jurisdiction, and we affirm. Second, we must determine whether we have jurisdiction to entertain a challenge to the district court's order remanding the original actions to the state court from which they came. We do not.

I

In early 1993, Ford and Citibank issued a co-branded Ford/Citibank credit card that offered cardholders the opportunity to save on the purchase or lease of a new Ford vehicle through a usage-incentive program. Under the program cardholders earned a 5% rebate on each purchase made using the Ford/Citibank credit card and could accrue a maximum of $700 in rebates per year (representing $14,000 in purchases) over a five-year period, for a maximum possible rebate of $3,500, redeemable toward the purchase or lease of certain Ford vehicles. On December 31, 1997--less than five years after the program's inception--Ford and Citibank terminated the rebate accrual feature of the Ford/Citibank credit card.

Six state actions were filed in Washington, Oregon, California, Illinois, Alabama, and New York, alleging generally that Ford and Citibank misrepresented or withheld information about the nature and duration of the rebate program and wrongfully discontinued it. Ford and Citibank removed each case to federal district court on the basis of diversity jurisdiction, then petitioned the Judicial Panel on Multidistrict Litigation (Panel) to consolidate **[956]** and transfer the cases to a single district court for pre-trial proceedings, pursuant to 28 U.S.C. § 1407. "Under 28 U.S.C. § 1407, [the Panel] is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district court for coordinated or consolidated pretrial proceedings upon its determination that transfer 'will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.'" Fed. Judicial Ctr., Moore's Federal Practice Manual for Complex Civil Litigation § 31.13 (3d ed.2000).

On January 8, 1998, and June 12, 1998, the Panel transferred the six removed actions to the Western District of Washington "for coordinated or consolidated pretrial proceedings." The transferee district court consolidated the cases on July 16, 1998, and a consolidated complaint was

filed on August 5, 1998. Purporting to sue on behalf of a nationwide class of six million Ford/Citibank cardholders, the consolidated plaintiffs alleged state law causes of action for breach of contract, unjust enrichment and consumer fraud, and plead diversity jurisdiction under 28 U.S.C. § 1332(a). The consolidated plaintiffs sought relief in the form of specific performance, disgorgement, and compensatory and punitive damages.

After transfer and consolidation, Ford and Citibank moved to dismiss the consolidated complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court denied the motion. The consolidated plaintiffs moved for class certification. However, after discovery was completed and the issue had been fully briefed by the parties, the district court deferred judgment on class certification and instead issued an order to show cause why "the consolidated action ... should not be dismissed for lack of jurisdiction, and why [the six underlying actions] should not be ... remanded to state court." Though neither party had challenged the district court's jurisdiction at any point in the proceedings, the district judge properly raised sua sponte the issue of whether the consolidated complaint alleged more than $75,000 in controversy under 28 U.S.C. § 1332(a).

Ford and Citibank filed a memorandum in support of jurisdiction, raising three reasons why the amount in controversy requirement was met: (1) the cost of compliance with the request for injunctive relief would exceed $75,000; (2) the consolidated plaintiffs have a common and undivided interest in their compensatory damages claim, which exceeds $75,000; and (3) the consolidated plaintiffs have a common and undivided interest in their punitive damages claim, which exceeds $75,000.

In an order dated October 29, 1999, the district court held that it "lack[ed] subject matter jurisdiction over the consolidated complaint and the six removed cases." The district court dismissed the consolidated complaint for lack of jurisdiction and remanded the underlying actions to the several state courts of origin.

Pursuant to the Panel's rules of procedure, *see* R.P.J.P.M.L. 7.6(a), the district court sent a copy of the order to the Panel on November 8, 1999. In the attached letter, the district judge explained:

> [T]his order dismisses, for lack of subject matter jurisdiction, a consolidated complaint filed by the plaintiffs in this court. The dismissal of the consolidated complaint necessitated a disposition of the six original actions filed in state court, removed to federal court on the basis of diversity of citizenship, and transferred by the Panel to the [Western District of Washington] for coordinated or consolidated pretrial proceedings. For lack of subject matter **[957]** jurisdiction, the order remands those cases to state court.

Ford and Citibank timely appealed, challenging both the district court's dismissal of the consolidated complaint and its remand of the underlying actions.

II

We must first consider whether we have jurisdiction to review the district court's order which states "[t]he consolidated complaint is hereby dismissed for lack of jurisdiction." Because the district court's dismissed the "complaint" rather than the "action," the question arises whether the order is final and appealable. "Ordinarily an order dismissing a complaint but not dismissing the action is not appealable under section 1291 unless circumstances make it clear that the court concluded that the action could not be saved by any amendment of the complaint." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir. 1984). However, "[i]f it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable." *Id.* (emphasis added).

Here, the record clearly indicates that the district court intended to dispose of the consolidated action. First, the dismissal did not grant leave to amend. *See id.*; *see also Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987) ("Failure to allow leave to amend supports an inference that the district court intended to make the order final."). We are also aided by the district court's contemporaneous letter to the Panel which demonstrates a clear intention to terminate the case. The district court expressly sent the letter "[i]n compliance with R.P.J.P.M.L. 7.6(a)," which provides that "[a]ctions terminated in the transferee district court by valid judgment ... shall not be remanded by the Panel and shall be dismissed by the transferee district court. The clerk of the transferee court shall send a copy of the order terminating the action to the Clerk of the Panel...." (Emphasis added).

Although a specific dismissal of the action would have been preferable, we conclude in this case that we have jurisdiction to review the dismissal order under 28 U.S.C. § 291.

III

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). Here, diverse citizenship is uncontested. Thus, the sole jurisdictional question is whether the minimum amount in controversy required to maintain a diversity suit in federal court is present. As the parties asserting diversity jurisdiction, Ford and Citibank bear the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds $75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

On appeal, Ford and Citibank do not contend that any plaintiff has an individual damages claim exceeding $75,000.

Nor do they contend that the individual plaintiffs' damages claims may be aggregated to satisfy the jurisdictional amount requirement. It is undisputed on appeal that the individual plaintiffs do not have a common and undivided interest in a claim for damages.

However, compensatory damages are not the only form of relief sought. The consolidated plaintiffs also seek injunctive relief, disgorgement, and punitive damages. **[958]** Ford and Citibank contend that each of these claims provides the requisite jurisdictional amount.

A.

Ford and Citibank first argue that their cost of compliance with the request for injunctive relief carries this case over the jurisdictional amount threshold. Relying upon our decision in *Sanchez*, 102 F.3d at 405, they contend that the amount in controversy requirement is satisfied if either party can gain or lose the jurisdictional amount (the so-called "either viewpoint" rule). Here, the consolidated plaintiffs seek specific performance of the rebate program, and Ford and Citibank submit that it will cost them more than $75,000 to reinstate and administer the rebate accrual feature of the Ford/Citibank credit card.

Under the "either viewpoint" rule, the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce. *See Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (holding that for purposes of calculating amount in controversy, "[t]he value of the thing sought to be accomplished by the action may relate to either or any party to the action") (internal quotation omitted). In other words, where the value of a plaintiff's potential recovery (in this case, a maximum of $3,500) is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes.

In *Sanchez*, we observed en banc that "*Ridder* ... rejected the 'plaintiff-viewpoint' rule, which states that courts attempting to determine the value of a claim for purposes of the amount in controversy requirement should look only to the benefit to the plaintiff, rather than to the potential loss to the defendant." 102 F.3d at 405 n. 6. *Ridder* stated that in suits involving equitable relief, "if the value of the thing to be accomplished [is] equal to the dollar minimum of the jurisdictional amount requirement to anyone concerned in the action, then jurisdiction [is] satisfied." 142 F.2d at 398. We did not apply *Ridder* in *Sanchez*, however, because the party with the burden of proof failed to provide any evidence to determine the extent of the loss that it would incur by an injunction.

But *Ridder* and *Sanchez* are single-plaintiff cases. Here, there are multiple plaintiffs seeking to sue on behalf of a putative class of six million individuals. We have specifically declined to extend the "either viewpoint rule" to class action suits. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977). This limitation on the rule should apply regardless of whether the requested class has been certified. Indeed, logic would dictate that it should apply to all multiparty complaints. While "[i]t may seem paradoxical to [decline jurisdiction] in the multiplaintiff setting," where the potential loss to defendants typically is well beyond the jurisdictional amount threshold, "it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a [party asserting federal jurisdiction] to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997).

In *Snow*, we acknowledged the inherent conflict between the "either viewpoint" rule and the non-aggregation rule when calculating the amount in controversy in class action suits seeking equitable relief, and determined that the former

must [959] yield. *Snow*, 561 F.2d at 788-91. In light of the Supreme Court's decisions in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973), prohibiting aggregation, we declined to apply *Ridder* in a class action suit seeking damages and injunctive relief, stating that "[in class actions,] the threshold question is aggregation, and it must be resolved affirmatively before total detriment [to the defendant] can be considered." *Id.* at 790. Otherwise, the principle of *Snyder* and *Zahn* would be subverted, i.e., plaintiffs with minimal damages could dodge the non- aggregation rule by praying for an injunction. *See id.* at 791. We recognized that " '[t]otal detriment' is basically the same thing as aggregation," and held that "where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief." *Id.* at 790 (internal quotation omitted).

Thus, under *Snow*, "the proper focus [in multiple plaintiff cases] is not influenced by the type of relief requested, but rather ... depend[s] upon the nature and value of the right asserted." *Id.* Put differently, "[w]hatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *Brand Name*, 123 F.3d at 610, citing *Snow*, 561 F.2d at 790. The question then becomes whether each plaintiff is asserting an individual right or, rather, together the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. If it is the latter, we may then look to the "either viewpoint" rule to determine jurisdiction. If it is the former, the test is the cost to the defendants of an injunction running in favor of one plaintiff. *See Brand Name*, 123 F.3d at 610.

In an effort to carry this case across the amount in controversy threshold in the face of *Snow*, Ford and Citibank first contend that the consolidated plaintiffs have a "common and undivided interest" in the injunctive relief they seek, and compliance will cost substantially more than $75,000. Second, they aver that it will cost them more than $75,000 to reinstate and administer the rebate accrual program whether it is done for one plaintiff or six million. Thus, they allege that the "either viewpoint" rule may be applied in this case without running afoul of the non-aggregation principle of *Snyder* and *Zahn*.

1.

Turning to the first point, we are helped to understand the meaning of "common and undivided interest" by *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997), where the court explained that "the 'paradigm cases' allowing aggregation of claims 'are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res.'" *Id.* (citation omitted). That does not fit the case before us in which the claims arising out of the termination of the rebate program do not implicate a "single indivisible res," and could be adjudicated on an individual basis because the consolidated plaintiffs (and putative class members) have no common and undivided interest in accruing rebates under the program. Each plaintiff charged purchases and accrued rebates individually, not as a group. **[960]** Thus, prior to litigation, they shared no common interest. As Ford and Citibank correctly stated in their memorandum opposing class certification, "[t]his case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions." They concluded that "[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims ... are separate and distinct." *Id.* at 1424.

In spite of this earlier concession, Ford and Citibank now urge us to adopt *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250 (N.D. Ill. 1996), and hold that the putative class members have a "common and undivided" interest in the "opportunity to accrue rebates" because the injunctive relief requested--reinstating the rebate accrual program-- necessarily would benefit the putative class as a whole. There, plaintiffs sought injunctive relief, requiring the defendants to notify all putative class members of the potential dangers of wearing a line of watches manufactured by the defendants that contained a radioactive isotope. *Id.* at 252-53. The court found that the injunctive relief requested--corrective advertising--would benefit the class as a whole and, thus, held that the putative class members had a "common and undivided interest" because "only the class, and not individual class members, could request the injunctive relief." *Id.* at 254.

We are foreclosed from adopting *Loizon* because our decision in *Snow* tells us that "the proper focus ... is not ... the type of relief requested, but rather ... the nature and value of the right asserted." 561 F.2d at 790. Here, the consolidated plaintiffs assert the right to accrue rebates under the canceled program. That right is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500. "The fact that the plaintiff[s] seek [specific performance] does not through shear [sic] alchemy transform a cause of action which will provide marginal benefits ... into a claim that meets the ... amount in controversy requirement." *Smiley v. Citibank*, 863 F. Supp. 1156, 1164 (C.D. Cal. 1993), relying on *Snow*, 561 F.2d at 791. As we held earlier, to hold otherwise would permit plaintiffs to circumvent the non-aggregation rule simply by seeking equitable relief.

Therefore, we hold that the consolidated plaintiffs in this case have not "unite[d] to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. "[T]he equitable relief sought [in this case] is but a means through which the individual claims may be satisfied," *Snow*, 561 F.2d at 790, and no plaintiff has an individual claim worth more than $75,000.

2.

The second effort to overcome *Snow* is the argument that because the cost of an injunction running in favor of one plaintiff would exceed $75,000, aggregating the cost of compliance is unnecessary to satisfy the amount in controversy requirement. In other words, while the monetary benefit to an individual plaintiff of reinstating the rebate accrual program would be relatively insubstantial, the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million. Thus, Ford and Citibank assert that because the non-aggregation rule would not be violated if their fixed administrative costs were used to establish the amount in controversy requirement, we may look to **[961]** the "either viewpoint" rule to establish the jurisdictional amount.

At first blush, this argument appears consistent with *Snow*. However, it is fundamentally violative of the principle underlying the jurisdictional amount requirement--to keep small diversity suits out of federal court. If the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, "then every case, however trivial, against a large company would cross the threshold." *Brand Name*, 123 F.3d at 610. "It would be an invitation to file state-law nuisance suits in federal court." *Id.* Therefore, we hold that the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000.

B.

Next, the defendants contend that the consolidated plaintiffs' unjust enrichment claim, which seeks disgorgement of "billions of dollars" of "ill-gotten benefit[s]," satisfies the amount in controversy requirement. Relying upon *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 48 F. Supp. 2d 37 (D.D.C. 1999), Ford and Citibank argue that "the plaintiff class has a collective right to a disgorgement in the amount of the unjust enrichment." *Id.* at 41. Several district courts have held that a claim for disgorgement falls within the "common and undivided interest" exception to the non-aggregation rule. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 720 (D. Md. 2001); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 828-29 (E.D. Mich. 1999); *Aetna*, 48 F. Supp. 2d at 41; *but see, Arnold v. General Motors Corp.*, 1998 WL 827726 at *2 (N.D. Cal. Nov. 18, 1998), relying on *Snow*, 561 F.2d at 790. These cases "rest their holdings upon the premise that disgorgement is a form of relief separate from, and independent of, individual damage recovery and that disgorgement 'would inure to the benefit of the class rather than vindicate any alleged violations of individual rights.'" *Microsoft*, 127 F. Supp. 2d at 720, quoting *Aetna*, 48 F. Supp. 2d at 41.

The Second Circuit rejected this argument, emphasizing that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs." *Gilman*, 104 F.3d at 1427. The court held that, despite its cloak of collectiveness, the plaintiffs' disgorgement claim was not aggregable for jurisdictional purposes because "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of defendant." *Id.* (internal quotation omitted). That is, simply because the plaintiffs request disgorgement of "all benefits" does not establish that the right which they seek to enforce is collective.

We agree with the Second Circuit. We point out that this position is consistent with our decision in *Snow*, where, as explained previously, we held that the proper focus in determining whether class action claims may be aggregated is not the type of relief requested, but rather the nature and value of the right asserted. 561 F.2d at 790. In the disgorgement context, the germane question becomes whether "the plaintiffs' claims are consistent with a demand for damages based on their individual transactions with [the defendants]." *Gilman*, 104 F.3d at 1425 n. 8.

Applying this to the case before us is not difficult. The "ill-gotten benefit" alleged in the consolidated plaintiffs' unjust enrichment claim is comprised of: (1) the "profit[s] from ... interest charges and **[962]** intercharge fees [Ford and Citibank] collected as a result of the billions of dollars Class members, including plaintiffs, charged on their Ford Citibank Cards," which they would not have used but for the canceled rebate accrual feature; and (2) the "expiration of billions of dollars in rebates earned by plaintiffs and class members." The complaint thus demonstrates that the consolidated plaintiffs have no common and undivided interest in the disgorgement of the alleged ill-gotten benefits. They charged purchases and accrued rebates individually, not as a group. Thus, prior to litigation, they shared no common interest. Each cardholder could have brought a separate and individual action to recover the alleged benefits. Thus, "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of the defendant[s]." *Id.* at 1427.

In seeking disgorgement, the consolidated plaintiffs do not unite to enforce a "single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. Therefore, the total disgorgement amount requested cannot be used to satisfy the jurisdictional amount requirement.

C.

Finally, Ford and Citibank argue that the claim for punitive damages satisfies the jurisdictional amount requirement because the punitive damages sought in this case are a single collective right in which plaintiffs have a common and undivided interest. In support of their argument, they rely on the Fifth and Eleventh Circuit's decisions in *Allen v. R & H Oil and Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), and *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), and our decision in *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

First, *Allen* and *Tapscott*, which held that punitive damages may be aggregated in class suits, have been disavowed by their respective circuits. *See H&D Tire and Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) (holding that *Allen* is not valid precedent because it conflicts with an earlier and, thus, controlling, pre-Fifth Circuit split opinion barring aggregation of punitive damages to establish diversity jurisdiction); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (holding that *Tapscott* is not valid precedent for same reason).

Second, the defendants contend that in *Dalkon Shield*, we "implicitly [held] that punitive damages may be aggregated for [jurisdictional] purpose[s]." They are wrong. In *Dalkon Shield*, we vacated the district court's class certification order but were silent on the issue of subject matter jurisdiction. The district court in *Dalkon Shield* had held that it had jurisdiction because, "[i]n the face of plaintiffs' allegations concerning punitive damages, [the] court cannot say to a legal certainty that the total award will not yield more than [the jurisdictional amount] to each successful claimant." *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 910 (N.D. Cal. 1981). The district court went on to state that "[t]he claims before this court for an award of punitive damages also satisfy the jurisdictional amount requirement ... [because] the plaintiffs ... have a

common and undivided interest in the recovery of punitive damages against the corporate defendant." *Id.* at 910-911. Because the district court's jurisdictional determination was disjunctive, our silence on the issue cannot be read as an implicit endorsement of the latter ground.

[963] Therefore, because we have not squarely addressed the issue, the question of whether punitive damages may be attributed *in toto* to each member of a putative class is a matter of first impression in this circuit. After the Fifth and Eleventh Circuit's retractions of *Allen* and Tapscott, all of the circuits that have considered the question now have answered in the negative. *See Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292 (10th Cir. 2001); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001); *Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000); *Brand Name*, 123 F.3d at 608-09 (7th Cir.); *Gilman*, 104 F.3d at 1431 (2nd Cir.). This view squares with our analogous jurisdictional amount decisions. *See Snow*, 561 F.2d at 790 (holding that the equitable relief sought by a class may not be aggregated where each class member's claim is separate and distinct); *Goldberg v. CPC International, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (holding that attorneys' fees sought by class members cannot be aggregated for purposes of determining the amount in controversy).

Our analysis is substantially similar to our discussion of the disgorgement remedy, and the focus remains, as it must in light of *Snyder* and *Zahn*, on whether the consolidated plaintiffs and putative class members unite to assert a single title or right. Though the consolidated plaintiffs and putative class members in this case

> may indeed share an interest in receiving [punitive] damages ... that has nothing to do with whether--prior to litigation--they jointly held a single title or right in which each possessed a common and undivided interest. It is irrelevant whether successful vindication of claims would create a single pool of

> recovery to be allocated among multiple plaintiffs; a common interest in a pool of funds is not the type of interest that permits aggregation of claims under the "common fund" doctrine.

Gilman, 104 F.3d at 1430. Or, as the Seventh Circuit stated in *Brand Name*, "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victim's of the defendant's misconduct" because "[a] plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant." 123 F.3d at 608-09; *see also*, *Allen*, 63 F.3d at 1334. Each consolidated plaintiff and class member could bring an individual action for punitive damages and have his or her rights adjudicated without implicating the rights of every other person claiming such damages. *See Gilman*, 104 F.3d at 1430. "Claims for punitive damages, like claims for compensatory damages, are brought together in a class action for the convenience of the plaintiffs," not because the plaintiffs share a common and undivided interest in a single, indivisible res. *See id.*

We join our sister circuits and hold that "punitive damages asserted on behalf of a [putative] class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest." *Gilman*, 104 F.3d at 1431. "To hold otherwise ... would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Id.*

For the foregoing reasons, we hold that Ford and Citibank have not met their burden of establishing that the jurisdictional amount in this case exceeds $75,000. The district court properly dismissed the consolidated **[964]** complaint for lack of subject matter jurisdiction.

IV

Last, Ford and Citibank contend that the district court erred when, after dismissing the consolidated complaint for lack of jurisdiction, it remanded the six underlying actions to their respective state courts of origin. They argue that the district court's dismissal of the consolidated complaint simultaneously terminated the underlying actions because the consolidated complaint superseded all previous complaints filed by the plaintiffs, rendering them "non-existent." Thus, the defendants assert that dismissing the consolidated complaint left the district court with nothing to remand and no authority to "revive" the underlying actions.

We first test our own jurisdiction: is the district court's remand order subject to our review? 28 U.S.C. § 1447(d) generally forbids appellate review of remand orders: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." However, the Supreme Court has interpreted section 1447(d) to prohibit "only remand orders issued under § 1447(c)." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) (abrogated on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)). That is, remand orders based upon any defect in removal or lack of subject matter jurisdiction are immune from review. *See* 28 U.S.C. § 1447(c); *Thermtron*, 423 U.S. at 351, 96 S. Ct. 584.

Here, the district court specifically held that it "lack[ed] subject matter jurisdiction over the consolidated complaint *and* the six removed cases" because Ford and Citibank failed to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332(a). (Emphasis added). Therefore, it dismissed the consolidated complaint and, pursuant to section 1447, remanded the six underlying actions to state court. Thus, it would appear clear that we are prohibited from reviewing the district court's remand order under section 1447(d).

However, Ford and Citibank argue that the remand order is not immune from our review because the district court did not, in fact, base its decision to remand on a lack of jurisdiction. *See Thermtron*, 423 U.S. at 350, 96 S. Ct. 584 (holding that the prohibition against review does not extend to remand orders entered on grounds not provided by section 1447). They contend that the district court's letter to the Panel "made clear that the remand component of its order was occasioned by docket-management considerations rather than by any jurisdictional finding." This is simply wrong. The letter expressly stated that "for *lack of subject matter jurisdiction*, the order remands [the underlying] cases to state court." (Emphasis added) There is not a word about docket management, or any other ground not provided by section 1447. Thus, the Thermtron exception does not apply.

Next, Ford and Citibank argue that they do not appeal the propriety of the district court's jurisdictional decision with respect to the underlying cases--which section 1447(d) would prohibit--but rather, they dispute the district court's *power* to render the decision in the first place. They contend that because "[t]he consolidated complaint superseded each of the original complaints, effectively establishing a single lawsuit," dismissal of the consolidated complaint terminated the underlying actions too. Thus, they argue, the district court erred by remanding "non-existent" actions to state court.

[965] Because this argument takes aim at the district court's *authority* to issue the remand order, we have jurisdiction to address the narrow question whether the consolidated federal complaint superseded the underlying state actions in such a way that they were in effect non-existent. *See N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) ("[U]nder Thermtron, we have jurisdiction to decide whether a district court has the power to do what it did in issuing a remand order,

although we cannot examine whether a particular exercise of power was proper.") (internal quotations omitted).

Ford and Citibank begin their argument with the premise that a consolidated complaint is "akin to an amended complaint," which "supersedes the original, the latter thereafter being treated as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). They thus contend that the consolidated complaint amended the original state complaints, rendering them "non- existent." However, they provide no authority for this proposition. The cases on which they rely merely stand for the unremarkable propositions that: (1) an amended complaint supersedes an original and (2) in a consolidated action, a consolidated complaint is the operative pleading and supersedes all previously filed complaints. No authority supports the contention that a consolidated complaint touches or disturbs underlying state claims.

Nor is there anything cited to us in the record that demonstrates the district court meant for the complaints in the remand cases to disappear. On the contrary, the plaintiffs "consolidate" their efforts into one document which becomes the operative pleading. No court order did anything more than this. Once that umbrella complaint was dismissed, it left the underlying state removed complaints intact. Therefore, the district court did not exceed its authority in remanding the underlying removed actions to state court and, pursuant to section 1447(d), we lack jurisdiction to review its decision.

AFFIRMED IN PART AND DISMISSED IN PART

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A., Cardholder Rebate Program Litigation

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JOHN B. MCCAULEY *et al.*,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, *et al.*,
Defendants.

Nos. 99-36115, 99-36206
(Consolidated)

[Filed Oct. 22, 2001]

Before: BROWNING, WALLACE, and T.G. NELSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge T.G. Nelson has voted to deny the petition for rehearing en banc, and Judge Browning and Wallace so recommend.

The Petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA),
N.A. CARDHOLDER REBATE PROGRAM LITIGATION

No. MDL-1199
This Document Relates To All Cases
[Filed October 29, 1999]

**ORDER OF DISMISSAL
AND REMAND TO STATE COURT**

I. INTRODUCTION

Six lawsuits were filed against defendants Ford Motor Company and Citibank (South Dakota), N.A., in courts of different states. Each complaint asserted solely state claims. The plaintiffs alleged that the defendants misrepresented or withheld information about the nature and duration of the Ford/Citibank cardholder rebate program and then wrongfully discontinued that program. The defendants removed each case to federal court on the basis of diversity jurisdiction. Between January 8, 1998, and June 12, 1998, the Judicial Panel on Multidistrict Litigation transferred the six cases to this court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On August 5, 1998, plaintiffs filed a consolidated complaint meant to supersede

the six original actions and purporting to sue on behalf of a nationwide class that would comprise an **[2]** estimated six million persons. The consolidated complaint asserts three claims, all based on state law (breach of contract, violation of state consumer protection statutes, and unjust enrichment), and pleads jurisdiction solely based on diversity of citizenship.

At the parties' mutual request, class certification and other proceedings were deferred for a period of time. Plaintiffs then moved for class certification and a hearing on the motion was held on July 29, 1999. During the hearing, plaintiffs requested additional discovery and supplemental briefing on the Rule 23 issues; the request was granted and the class action motion was renoted for October 7, 1999.

No motion for remand or challenge to the existence of diversity jurisdiction has been filed.[1] The defendants' supplemental brief opposing class certification, however, raised certain arguments that cast doubt on the existence of jurisdiction.[2] Recognizing that the court's duty is to inquire sua sponte into jurisdiction when appropriate, *see Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 8 (9th Cir. 1974) citing *California v. LaRue*, 409 U.S. 109, 112-13 n.3 (1972)), the court issued a show cause order on October 14, 1999. In response, the plaintiffs make no arguments for diversity jurisdiction even though they pleaded it in their

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1 A motion to remand one of the six cases, *Merrick v. Ford Motor Co.*, No. C98-153WD, was withdrawn before a decision was made.

2 *See* Defs.' Suppl. Mem. Opp'n Class Cert. (Dkt. # 113) at 14 ("This case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions. The Ninth Circuit has made clear that aggregated damages may not be awarded in this type of case. . ."). *See also id.* at 4 ("As to both proposed classes, plaintiffs suggest a variety of aggregated damage-calculation methodologies, while ignoring the fact that claimant-specific jury trials are needed to determine which (if any) cardholders were 'damaged' in the first place.").

consolidated complaint. "[T]he trend," they say, "suggests jurisdiction is questionable." Pls.' Resp. Order Show Cause ((Dkt. # 117) at 3. Defendants, on the other hand, argue that the requirements for diversity jurisdiction are met.

[3] II. ANALYSIS

A. Legal Standard

A defendant may remove a case from state to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. Removal jurisdiction is "strictly construed and federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-9 (1941) and *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). Should the district court determine that it lacks subject matter jurisdiction over the removed case, the district court must remand it to state court. 28 U.S.C. § 1447. A transferee court conducting pretrial proceedings under 28 U.S.C. § 1407 has the power to enter an order to remand. *See* R.P.J.P.M.L. 7.6(a). *See also In re Ivy*, 901 F.2d (2d Cir. 1990). Where, as here, jurisdiction is asserted based on diversity of citizenship, there must be complete diversity between the class representatives and the defendants, and the "matter in controversy" must exceed $75,000. 28 U.S.C. § 1332(a). Here the parties are of diverse citizenship, and the question is whether the consolidated complaint places more than $75,000 in controversy. The defendants, as the parties asserting federal jurisdiction, have the burden of proving by a preponderance of the evidence that the jurisdictional amount requirement is met. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Defendants do not content that the actual damages suffered by any one of the plaintiffs or putative class members exceeds $75,000. Instead, they argue that (1) the plaintiffs' "common and undivided" interest in compensatory damages; (2) the cost of complying with the requested in-

junctive relief; and (3) plaintiffs' request for punitive damages, each meets the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332(a).

There is consensus among courts but dispute among commentators as to whether to apply the law of the transferee district of the transferor district to multidistrict litigation proceedings. Here, the transferor courts were sited in the Second, Seventh, Ninth, and Eleventh Circuits. In a leading case **[4]** on the subject, the District of Columbia Circuit held that "the law of a transferor forum on a federal question. . .merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit." *In re Korean Airlines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd on other grounds sub nom., Chan v. Korean Airlines Ltd.*, 490 U.S. 122 (1989). *But see* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 705-6 (1995) (arguing that the law of the transferor forum should be applied). While the case law suggests that the law of the Ninth Circuit should be applied, the court has also considered the laws of the transferor districts in determining what is "ultimately a single proper interpretation of federal law." *In re Korean Air Lines Disaster*, 829 F.2d at 1175.

B. The "Common Fund" Exception to the "Non-Aggregation" Rule

In meeting the jurisdictional minimum, the separate and distinct claims of plaintiffs and class members may not be aggregated. *See Snyder v. Harris*, 394 U.S. 332, 335-36 (1969). Instead, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). Where, however, "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest," their claims may be aggregated to reach the jurisdictional minimum. *Zahn*, 414 U.S. at 294 (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)). *See also* 14B Charles Alan Wright et al., Federal Practice and Procedure § 3704 (3d ed. 1998). The paradigmatic cases permitting the aggregation of claims "are those cases which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res." *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997) (citation omitted). *See also Eagle v. AT&T Co.*, 769 F.2d 541, 546-47 (9th Cir. 1985); *Potrero Hill Community Action Comm. v. Housing Auth.*, 410 F.2d 974, 979 (Cir. 1969).

[5] The plaintiffs here allege that the defendants misrepresented or withheld information about the cardholder rebate program and then wrongfully discontinued that program. No plaintiff or putative class member has a compensatory claim greater than $3,500. Defendants contend that the jurisdictional minimum is nonetheless met because plaintiffs have requested as damages an "'aggregate award' of 'class-wide damages' without reference to the damages incurred by any individual cardholder." Defs.' Resp. Order Show Cause (Dkt. # 119) at 8 (quoting Pls.' Suppl. Mem. Supp. Class Cert. (Dkt. #107) at 12-13). Defendants' argument focuses on the wrong issue: the "aggregate award" plaintiffs seek is a class action construct with no link to whether the plaintiffs shared a pre-litigation interest in the subject of the litigation. *See Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1427 (2d Cir. 1997) ("Under the classic 'common fund' cases, what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs."). Each plaintiff's claim arises out of that plaintiff's contract with the defendants, each plaintiff may sue individually to recover from the defendants, and no plaintiff's claim implicates any other plaintiff's rights. Thus, the monetary claims asserted are not a "common and undivided interest" to enforce a "single title or right" for purposes of meeting the jurisdictional minimum under 28

minimum under 28 U.S.C. § 1332(a). *See Gilman*, 104 F.3d at 1428 ("these features of the case do not demonstrate a unitary claim; they merely reflect the problems of theory and proof in this case, and the named plaintiff's efforts to solve or plead around them"). The common fund exception to the non-aggregation principle is inapplicable, and thus, with respect to compensatory damages, defendants have not met their burden of proof concerning the amount in controversy.

C. Cost of Compliance with Injunctive Relief

Defendants next argue that the jurisdictional minimum is met because the cost to them of complying with the requested injunctive relief would be "significantly in excess of $75,000." Defs.' Resp. at 6. The injunctive relief sought by the plaintiffs is the "specific performance of the Rebate **[6]** Program to plaintiffs and Class members." Cons. Compl. (Dkt. # 18) at 13. Defendants argue that plaintiffs have a "common and undivided interest," that the injunctive relief sought "can only go to class plaintiffs as a class," Defs.' Resp. at 7, and that therefore the non-aggregation rule of *Snyder* and *Zahn* is inapplicable.

This argument is based on testimony that "the fixed costs in operating a rebate program for millions of cardholders," which exceed $75,000 per year, "would not depend on the extent of cardholder usage." Defs.' Resp. at 6. The injunctive relief sought, however, is simply a means to vindicate each plaintiff's separate and individual claim for accrual of rebates for five years. Plaintiffs' having made class action allegations does not alter the nature of the rights asserted. Where, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought, to permit aggregation of the former but not the latter would undermine the principles of *Snyder* and *Zahn*. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir. 1977). Just as the compensatory claims may not be aggregated because the plaintiffs do not seek to enforce a common

and undivided interest, the injunctive relief based on those same interests may not be aggregated.

The "either viewpoint" rule pressed by the defendants and espoused by some courts—that the amount in controversy may be determined by the "value of the thing sought to be accomplished by the action[, which] may relate to either or any party to the action," *Ridder Bros., Inc v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944)—does not alter the result. Defendants have failed to show that the cost to them of allowing one cardholder to accrue rebates for the full five-year period, the required analysis under the non-aggregation principle of *Snyder* and *Zahn*, would meet the jurisdictional minimum. Whether determined from the plaintiffs' or the defendants' viewpoint, the defendants have failed to show that the value of the injunction enforced as to any one cardholder would exceed $75,000.

[7] D. Punitive Damages

Defendants also argue that the amount in controversy requirement has been met because of the plaintiffs' prayer for punitive damages. They do not contend that any plaintiff's recovery of punitive plus compensatory damages could reach $75,000 (at that level, a recovery for six million class members would be the absurd total of $450 billion); instead, they argue only that the claims should be aggregated. But, as with the requests for compensatory damages and injunctive relief, under *Snyder* and *Zahn* the total claimed as punitive damages may not be attributed to each individual plaintiff for purposes of satisfying the jurisdictional minimum. Defendants' argument rests heavily upon *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). There, the Fifth Circuit held that, under Mississippi law, "the full amount of alleged [punitive] damages [must] be counted against each plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333. While the Eleventh Circuit has adopted the state-law based rationale of *Allen*, *see Tapscott v. MS Dealer Serv. Corp.*, 77

F.3d 1353, 1359 (11th Cir. 1996), the other circuit courts to consider the issue have rejected the holding in *Allen*, *see Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997); *Anthony v. Security Pac. Fin. Servs.*, 75 F.3d 311 (7th Cir. 1996), and the Fifth Circuit itself has stated that the result in *Allen* is peculiar to Mississippi law, *see Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998).[3]

[8] As with injunctive relief, to permit the aggregation of punitive damages, when actual damages could not be aggregated, "would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Gilman*, 104 F.3d at 1431. Punitive damages are not the sort of "common fund" allowing for the aggregation of damages. One cardholder's ability to recover such damages against Ford or Citibank for the termination of the rebate program is not dependent on any another [sic] cardholder, and a recovery by one cardholder would not implicate the rights of any

[3] Contrary to the defendants' arguments, the Ninth Circuit has not addressed this issue. The Ninth Circuit's silence on the issue of aggregation when it vacated *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), does not mean that it agreed with the district court that aggregation of punitive damages was correct. The district court had offered alternative theories for the existence of diversity jurisdiction. 526 F. Supp. at 910-11. It cannot be said on what basis (if any) the Ninth Circuit found the jurisdictional minimum to be met. Furthermore, the court's approval of *Allen* in *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) ("We agree with the Fifth Circuit."), in no way indicates an approval of *Allen*'s aggregation theory. *Singer* did not deal with aggregation of punitive damages, but instead involved whether and to what extent the court should look beyond the complaint and the removal petition to determine the amount in controversy. Because of the Ninth Circuit's holding in *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982), other courts have assumed that the Ninth Circuit would not permit aggregation of punitive damages. *See Ard v. Transcon. Gas Pipe Line Corp.*, 183 F.3d 596, 601 n.3 (5th Cir. 1998); *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1251 (D. Ariz. 1996).

other cardholder. For example, a cardholder who opted out of the putative class could seek punitive damages without regard for the disposition of the class suit.

Even under the rationale espoused by the Fifth and Eleventh Circuits, the nature of the state laws at issue in this case do not support the aggregation of punitive damages. Both circuits have held that the determination of whether the plaintiffs' claims to punitive damages are common and undivided is driven by state law. *See Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999); *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358-59 (11th Cir. 1996); *Allen*, 63 F.3d at 1333-34. On a motion for rehearing, the *Allen* court emphasized this point. *Allen v. R & H Oil & Gas Co.*, 70 F.3d 26, 26 (5th Cir. 1995) (per curiam) ("[T]he panel is of the unanimous view that the opinion in this case specifically reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state."). *See also Ard*, 138 F.3d at 602 (in distinguishing *Allen*, noting the "peculiar nature of Mississippi law").

It is disputed which state's (or states') laws will apply to the claims of the plaintiffs. *See* Defs.' Supp. Mem. at 8 n.2. The plaintiffs now claim that the laws of New York or South Dakota will apply. Pls.' Supp. Memo. at 4. In a well-reasoned opinion, the Second Circuit rejected the **[9]** aggregation of punitive damages under New York law. *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997). The court held that because a plaintiff cannot recover punitive damages under New York law unless he "asserts an underlying cause of action upon which a demand for punitive damages can be grounded," punitive damages may be aggregated only where the underlying cause of action may be aggregated, i.e., represents a common and undivided interest. *Gilman*, 104 F.3d at 1431. South Dakota's law of punitive damages is the same in this respect as New York's. *See*

Schaffer v. Edward D. Jones & Co., 521 N.W.2d 921, 928 (S.D. 1994). Thus, even under *Allen* and *Tapscott*, the plaintiffs here do not have a common and undivided interest in the monetary damages or injunctive relief sought, and punitive damages may not be aggregated.

III. CONCLUSION

For the reasons stated, defendants have failed to show by a preponderance of the evidence that the amount in controversy requirement of 28 U.S.C. §1332 has been met. The court therefore lacks subject matter jurisdiction over the consolidated complaint and the six removed cases. The consolidated complaint is hereby dismissed for lack of jurisdiction, and the six cases originally filed in state court, and removed to federal court by the defendants, are now remanded to state court as follows:

Copeland v. Ford Motor Co., No. C98-81 7WD, to the Circuit Court of Tuscaloosa County, Alabama (No. CV-97-970);

Essig et al. v. Ford Motor Co., No. C98-152WD, to the Supreme Court of the State of New York, County of Suffolk (No. 97-18514);

Hornreich et ux. v. Ford Motor C. et al., No. C97-1293WD, to the Superior Court of Washington for King County (No. 97-2-16935-6SEA);

LaGrou v. Ford Motor Co. et al., No. C98-226WD, to the Superior Court of the State of California, County of Los Angeles (No. BC180583);

McCauley v. Ford Motor Co. et al., No. C98-151WD, to the Circuit Court of Cook County, Illinois (No. 97L08315); and

Merrick v. Ford Motor Co. et al., No. C98-153WD, to the Circuit Court for the State of Oregon, County of Multnomah (No. 9708-06079).

[10] The clerk if directed to send copies of this order to all counsel of record.

Dated: October 29, 1999.

/s/
William L. Dwyer
United States District Judge

Supreme Court, U.S.
FILED
JA

No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. McCAULEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should overrule its well-understood holdings of *Snyder* and *Zahn* and permit courts to aggregate class members' "separate and distinct" claims for injunctive relief when determining if the $75,000 amount-in-controversy requirement is met.

2. Whether this Court should review the uniform rule in the circuit courts of appeal that class members' "separate and distinct" punitive damages claims may not be aggregated to satisfy the amount-in-controversy requirement.

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STATEMENT OF THE CASE

This case concerns a class action involving parties of different states and "separate and distinct" claims of individuals brought under state law. In *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court held that Rule 23 did not alter the long-standing traditional rule that "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement" of the diversity statute. 394 U.S. at 335; 414 U.S. at 294. In contrast, where "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest," their claims may be aggregated to reach the jurisdictional threshold. *Zahn*, 414 U.S. at 294.

In this case, there is no dispute that plaintiffs' underlying claims are "separate and distinct," nor is there any dispute that this case was brought as a class action and is thus governed by the nonaggregation principle confirmed by this Court in *Snyder* and *Zahn*. In addition to compensatory damages, however, plaintiffs asserted claims for injunctive relief and punitive damages. Admittedly, this Court has not spoken conclusively about how to value the amount-in-controversy in the class action context where, like here, injunctive relief is requested as the surrogate through which the "separate and distinct" damage claims can be satisfied. Yet, there is no doubt that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977) (citing cases dating back to 1907). And, application of either the "plaintiff's viewpoint" rule or the "either viewpoint" rule to the facts of this case reaches

the same result: the value of the "object of the litigation" is less than $75,000. In fact, the district court found that even under the "either viewpoint" approach, Petitioners "failed to show that the value of the injunction enforced as to any one cardholder would exceed $75,000." Pet. App. at 29a. In a different case, and under a different set of facts, the need for clarification of these long-standing rules and their interrelationship might manifest. But, on these facts, review is not warranted.

Similarly, this Court has not conclusively spoken to the method by which the amount-in-controversy requirement of the diversity statute is calculated when plaintiffs allege punitive damages. However, unlike the injunctive relief question, there simply is no divergence of views among the lower courts. Indeed, the circuit courts of appeal uniformly agree that any potential punitive damages award must be divided *pro rata* among class plaintiffs and may not be aggregated to determine the amount-in-controversy. Until the diversity statute is amended or a novel interpretation of the statute is espoused by a single circuit court of appeal that conflicts with the existing uniform interpretation, there is no need for further commentary by this Court.

1. The district court dismissed the consolidated complaint for lack of jurisdiction.

As Petitioners note, this case arises out the termination of the Ford Motor Co./Citibank rebate program. In response to the termination of the program, Respondents filed six class actions between January 9, 1998, and June 12, 1998, alleging only state claims in the state courts of Washington, Oregon, California, Illinois, Alabama, and New York. The complaints generally alleged misrepresentations on the part of the

Petitioners and that the rebate program was wrongfully terminated. Pet. App. at 23a.

Asserting diversity jurisdiction, Petitioners removed each case to federal court, and the Judicial Panel on Multidistrict Litigation transferred the cases for consolidated pretrial proceedings to the Western District of Washington. *Id.* Respondents then filed a consolidated class complaint, pleading diversity jurisdiction, on behalf of the estimated six million class members. *Id.* at 24a. Among other things, the consolidated complaint sought compensatory and punitive damages, and an injunction reinstating the wrongfully terminated rebate program. *Id.* at 4a.

After class certification discovery, and following an initial hearing on class certification, *sua sponte* the district court issued an order to show cause why the action should not be dismissed for lack of jurisdiction. *Id.* at 24a. The district court's show cause order was prompted by arguments raised in Petitioners' supplemental brief opposing class certification. *Id.* & n.2.

In response to the show cause order, Petitioners argued for diversity jurisdiction, while Respondents suggested that jurisdiction was "questionable." *Id.* at 25a. Even though no plaintiff or putative class member could possibly have a claim greater than $3,500, Petitioners contended that the jurisdictional amount-in-controversy was met for three reasons: (i) plaintiffs requested an aggregate award of damages "without reference to the damages incurred by any individual cardholder", *id.* at 27a; (ii) the cost of compliance with the injunctive relief requested would be "significantly in excess of $75,000", *id.* at 28a; and (iii) punitive damages

were prayed for and should be aggregated to determine whether the requisite amount-in-controversy was met, *id.* at 29a.[1] The district court rejected each one of Petitioners' arguments and dismissed the consolidated complaint for lack of jurisdiction.

First, the district court rejected Petitioners' "aggregate award" argument because the district court found that the action involved "separate and distinct" claims, and thus under this Court's holdings of *Snyder* and *Zahn*, such claims could not be aggregated to meet the amount-in-controversy requirement. *Id.* at 27a-28a.

Second, the district court rejected Petitioners' argument that the jurisdictional minimum was met by the cost of complying with the injunctive relief requested. The district court did so for two reasons: (i) the cost to comply with an injunction could not serve to satisfy the amount-in-controversy requirement "where, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought," as to do so would run contrary to the "principles of *Snyder* and *Zahn*," *id.* at 28a; and (ii) even under the "either viewpoint" rule, the district court found that Petitioners "failed to show that the value of the injunction enforced *as to any one cardholder* would exceed $75,000," *id.* at 29a (emphasis added). Thus, Petitioners failed to carry their burden of proving that it would cost more than $75,000 to reinstitute the rebate program even for one plaintiff.

1. Petitioners did *not* argue to the district court that "any plaintiff's recovery of punitive plus compensatory damages could reach $75,000 (at that level, a recovery for six million class members would be the absurd total of $450 billion)." *Id.* at 29a.

Thirdly, and lastly, the district court rejected Petitioners' contention that a prayer for punitive damages requires aggregation. Again, relying on *Snyder* and *Zahn*, the district court ruled that "to permit the aggregation of punitive damages, when actual damages could not be aggregated, 'would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate.'" *Id.* at 30a (quoting *Gilman v. BHC Sec.*, 104 F.3d 1418, 1431 (2d Cir. 1997)). The district court further found that under New York and South Dakota punitive damages law, the minimum threshold was not met because plaintiffs do not have a "common and undivided interest" in the punitive damages, and thus such damages could not be aggregated without running afoul of *Snyder* and *Zahn*. The district court found absurd the assertion that a disaggregated (i.e., *pro rata*) punitive damage award could reach the requisite $75,000 per class member, noting this would require an award of $450 billion. *Id.* at 29a.

2. The Ninth Circuit affirmed the dismissal of the consolidated complaint for lack of jurisdiction.[2]

a. The panel first addressed Petitioners' contention that the cost of compliance with the requested injunctive relief carries them over the jurisdictional threshold. After reviewing the history of applying the "either viewpoint" rule to class actions,[3] the court started its analysis by correctly noting that

2. On appeal, Petitioners did not contend that plaintiffs' damages claims could be aggregated to meet the amount-in-controversy requirement, or that plaintiffs' claims were "common and undivided" as opposed to "separate and distinct." Pet. App. at 6a-7a.

3. The Ninth Circuit has rejected the "plaintiff viewpoint" rule when determining the value of non-class claims for purposes of (Cont'd)

in actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation. *Id.* at 9a (citing *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977)); *Hunt*, 432 U.S. at 347. Naturally, in valuing the object of the litigation, a court must first determine which viewpoint to use: either (i) value it from the plaintiff's perspective or (ii) use the defendant's cost of complying with the requested relief. According to the panel, and relying on this Court's holding in *Snyder*, only if plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest" may a court "look to the 'either viewpoint' rule to determine jurisdiction." Pet. App. at 9a. Otherwise, according to the panel, the "test is the cost to the defendants of an injunction running in favor of one plaintiff." *Id.* (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997) *cert. denied*, 522 U.S. 1153 (1998)).

Here, just like the district court, the panel first held that plaintiffs do not possess a "common and undivided" interest in the injunctive relief. *Id.* at 9a-10a. The court emphasized the "right [to injunctive relief] is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500." *Id.* at 11a. In other words, the court found that the equitable relief sought in this case, and under these facts, was merely a "means through which the individual claims may be satisfied," and thus the object of the litigation could be valued at no more than $3,500 per plaintiff. *Id.* at 12a.

(Cont'd)
determining whether the amount-in-controversy requirement is satisfied. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 n.6 (9th Cir. 1996) (en banc); *Ridder Bros. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944).

Following the finding that the injunctive relief claims are "separate and distinct" and valued at no more than $3,500 per plaintiff, the panel correctly proceeded to test whether the cost of an injunction running in favor of one plaintiff would exceed $75,000. Departing some from the disjunctive rationale of the district court,[4] the panel concluded that, as a matter of law, court-ordered administrative compliance costs incurred by the defendant could not satisfy the amount-in-controversy requirement in this case. The court reasoned that, if permitted, "every case, however trivial, [brought] against a large company would cross the [jurisdictional] threshold." *Id.* at 12a.

b. The panel also rejected Petitioners' contention that the prayer for punitive damages satisfied the amount-in-controversy requirement because, according to Petitioners, such damages are a "single collective right in which plaintiffs have a common and undivided interest." *Id.* at 15a. Like the underlying claims, the court emphasized that plaintiffs, prior to the litigation, failed to share or jointly hold a single title or right (i.e., plaintiffs did not have a "common and undivided interest" in punitive damages), and that therefore, in light of *Snyder* and *Zahn*, such damages could not be aggregated. Without aggregation, the court upheld the district court's finding that jurisdictional amount could not be and was not met. *Id.* at 17a.

4. In addition to concluding that the injunctive relief was the means through which plaintiffs sought to satisfy their individual claims, the district court also found that Petitioners had failed to prove that the amount-in-controversy was satisfied even for one plaintiff. Pet. App. at 29a.

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS INAPPROPRIATE BECAUSE THERE IS NO TRUE CONFLICT BETWEEN THE CIRUITS IN THE CONTEXT OF THIS CLASS ACTION WHEN INTERPRETING THE LONG-STANDING RULES THAT GOVERN THE DETERMINATION OF THE AMOUNT-IN-CONTROVERSY FOR INJUNCTIVE RELIEF UNDER 28 U.S.C. § 1332

A. The Rule for Valuing Injunctive Relief to Determine Whether the Amount-In-Controversy Requirement Under the Diversity Statute Is Well-Settled

Citing cases dating as far back as 1907, this Court conclusively pronounced that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt*, 432 U.S. at 347. Petitioners do not contest the validity of this requirement. Instead, in an attempt to convince this Court that there are conflicting or confusing rules of law pertaining to valuing injunctive relief requested by a class or putative class, Petitioners argue that the "plaintiff's viewpoint" rule and the "either viewpoint" rule conflict when valuing the object of *this* litigation. Petitioners' are wrong.

B. Requests for Injunctive Relief Made by a Class Do Not Invariably Create a Conflict of Opinion within the Circuit Courts of Appeal. Indeed, this Litigation Exemplifies the Harmony among the Different Viewpoint Approaches to Valuing Injunctive Relief

Admittedly, the circuit courts of appeal have adopted different rules for determining from which viewpoint the court should value an injunction, the so-called "object of the litigation," in the class action context. The Third, Fifth, Eighth, Tenth, and Eleventh Circuits look to the value to the plaintiff of the relief requested; this is the so-called "plaintiff's viewpoint" rule. *See Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir.) *cert. denied*, 510 U.S. 964 (1993); *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724, 726-27 (5th Cir. 1962); *Massachusetts State Pharmaceutical Asso. v. Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970); *Lonnquist v. J. C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970); *Ericsson GE Mobile Communs. v. Motorola Communs. & Elecs.*, 120 F.3d 216, 219-20 (11th Cir. 1997). These circuit courts value the object of the litigation in this manner principally because, the panels' reason, to consider the "total detriment" to the defendant of compliance with an injunction entered against a defendant in cases involving "separate and distinct" claims would run afoul of the nonaggregation principle espoused by this Court in *Snyder* and *Zahn*. *See, e.g.*, *Federal Prescription*, 431 F.2d at 132 n.1 ("In a class action where the aggregate amount of damages to the class exceeds $10,000, the value of the thing to be accomplished by the action, (judgment for the aggregate amount) as to the defendant exceeds the jurisdictional

amount. . . . The Court in *Snyder* does not recognize the presence of the jurisdictional amount in that situation.") (citation omitted).

The Seventh and Tenth Circuits have adopted the "either viewpoint" approach in which the cost of the injunction to the defendant can, in the proper circumstances, establish the minimum amount-in-controversy in a class action. *See Brand Name*, 123 F.3d at 609-10 (7th Cir.); *Justice v. Atchison, T. & S.F.R. Co.*, 927 F.2d 503, 505 (10th Cir. 1991).[5] To avoid running afoul of the aggregation prohibition of *Snyder* and *Zahn*, courts that use the "either viewpoint" rule in the class action context value the object of the litigation by testing the cost to the defendant of an injunction running in favor of *one* plaintiff. *See Brand Name*, 123 F.3d at 610. Thus, even the "either viewpoint" courts interpret the amount-in-controversy requirement as being similarly impacted by the nonaggregation principle applicable to class actions.

5. Petitioners cite several cases suggesting that additional circuit courts of appeal have decided which viewpoint rule to employ in the class action context when determining the value of a requested injunction. Several of the cases that Petitioners cite, however, are not class actions. *See Kheel v. Port of New York Auth.*, 457 F.2d 46 (2d Cir.) *cert. denied*, 409 U.S. 983 (1972); *Smith v. Washington*, 593 F.2d 1097 (D.C. Cir. 1978); *Gov't Employees Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964); *Ridder Bros*, 142 F.2d 395 (9th Cir. 1964).

Furthermore, the First Circuit, contrary to Petitioners' argument, does not appear to have decided the specific issue. In *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969) *cert. denied*, 396 U.S. 1037 (1970), the court found that class plaintiffs had a "common and undivided" interest. *Id.* at 315. Thus, the nonaggregation principle articulated in *Snyder* and *Zahn* does not apply.

Here, the Ninth Circuit, consistent with its opinion in *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977), refused to extend application of the "either viewpoint" rule to class actions because of the nonaggregation principle established by this Court. Pet. App. at 8a-9a. However, the panel nevertheless tested the amount-in-controversy in a manner consistent with the "either viewpoint" rule when it determined that the "test is the cost to the defendants of an injunction running in favor of one plaintiff." *Id.* at 9a (citing *Brand Name*, 123 F.3d at 610). In so doing, the panel avoided any conflict between the two viewpoint approaches and complied with the traditional and historic test for determining the value of the "object of the litigation." Similarly, the seemingly conflicting opinions of the Tenth Circuit, which are cited above, are understood as presenting no conflicting application of the rules of law in interpreting the amount-in-controversy requirement for an injunction sought by a class.

Petitioners infer that such an approach, and the one taken by the panel below, is a means of harmonizing the "either viewpoint" rule with the nonaggregation principle where the underlying claims are "separate and distinct." Pet. at 11. Indeed, in *Brand Name*, the Seventh Circuit emphasized that the amount-in-controversy test cannot be the total detriment to the defendant of an injunction entered on behalf of the class, for that would run afoul of the nonaggregation principle articulated in *Snyder* and *Zahn*. *Brand Name*, 123 F.3d at 609-10.

Thus, there is, in actuality, no conflict between the "either viewpoint" rule and the "plaintiff viewpoint" rule in the class action context. Every court of appeals acknowledges the limitation imposed by the nonaggregation principle of *Snyder* and *Zahn*, and every circuit court values the object of the

litigation without aggregating "separate and distinct" claims. And, that is exactly what occurred in this case. Both the district court and the court of appeals determined that the value of the "separate and distinct" right asserted (i.e., the right to accrue rebates) could be no more than $3,500, which is well below the jurisdictional threshold. Pet. App. at 11a. Thus, the jurisdictional threshold could not be reached without aggregation.

C. Neither the District Court or the Ninth Circuit Erred in Determining that Petitioners Failed to Prove the Requisite Amount-In-Controversy

To be sure, there is a difference between those courts that permit consideration of the cost of an injunction to a defendant and those that do not. Under a different set of circumstances, such differences might merit consideration by this Court, as Petitioners correctly note there is some confusion among the lower courts and between legal scholars about this issue. However, this case is not the proper vehicle to resolve this issue because the issue was correctly decided below under the "either viewpoint" rule.

As explained above, the district court found that Petitioners failed to meet their burden of proving that the "value of the injunction enforced as to any one cardholder would exceed $75,000." Pet. App. at 29a. This finding conclusively forecloses the error Petitioners' contend occurred because a contrary finding is necessary to assert jurisdiction under the "either viewpoint" rule.

Furthermore, and perhaps more significantly, no court under any approach has accepted the argument that the ministerial business costs of compliance with an injunction

satisfy the amount-in-controversy requirement.[6] Just like the panel below, Judge Posner, in *Brand Name*, specifically emphasized that if such an argument were accepted, "then every case, however trivial, against a large company would cross the threshold." 123 F.3d at 610. Here, Petitioners argued that the business costs of reinstituting the rebate program, even for one plaintiff, exceeded the $75,000 threshold. The district court found that Petitioners failed to prove this jurisdictional fact. Pet. App. at 29a. Nevertheless, these business costs are simply not the kind of business costs that courts would consider even under the "either viewpoint" approach. Pre-litigation, the Petitioners had the rebate program in place, the business apparatus had been designed, employees had been hired, and the rebate plan was operational. The injunction requested, at the time the suit was filed, was simply to keep the business practice going as

6. Petitioners erroneously suggest that this Court has approved the use of defendant's "compliance costs" when calculating the value of the object of the litigation. Pet. at 8 n.2 (citing *Hunt*). In *Hunt* the compliance costs properly considered were the cost to *plaintiffs in complying with a statute they sought to enjoin*. *See Hunt*, 432 U.S. at 347 ("The value of that right is measured by the losses that will follow from the statute's enforcement."). Indeed, these compliance costs were costs imposed on plaintiffs and required by them to change their business practices to comply with the allegedly unlawful statute. Such costs are vastly different than costs imposed on a defendant business that is ordered to continue an existing business practice by operation of law. Moreover, no case decided by this Court has approved the use of such "compliance costs" in valuing the object of the litigation. In fact, no case decided by this Court has considered it proper to value an injunction from the defendant's perspective when determining whether the "object of the litigation" exceeds the jurisdictional prerequisite. *See, e.g.*, *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939) (refusing to discuss the defendant's perspective in a cases seeking injunctive relief); *Scott v. Frazier*, 253 U.S. 243 (1920) (same).

a means to compensate plaintiffs for the damages suffered. It was not as though the injunction requested Ford or Citibank to design a new program or create a new product and thus alter their business practices. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp.2d 702, 718-19 (D. Md. 2001) (noting the value of the litigation (i.e., creating a Windows operating system untied from the Internet Explorer) would cost more than $58 million to create). The injunction requested would simply have maintained the business status quo until each plaintiff had been paid up to $3,500 in value.

Furthermore, the primary object of this litigation, as is uncontested, is for plaintiffs to receive the benefit of the bargain of the rebate program that Ford and Citibank unlawfully terminated. That right was valued at $3,500 — at most — for any one plaintiff. Pet. App. at 11a-12a. Thus, because the object of the litigation was valued at no more than $3,500 per plaintiff, in accordance with *Hunt* and the nonaggregation principle applicable to class actions, this case does not meet the jurisdictional threshold on the facts.

D. The Doctrine of *Stare Decisis* Militates Against Granting Petitioners' Request

As this Court has stated, *stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

Although unstated, what Petitioners truly request is for this Court to revisit the holdings of *Snyder* and *Zahn* and the scope and reach of the diversity statute in the class action context to value the "object of the litigation" differently. The relevant decisions of this Court, however, have stood for decades and, more importantly, were the products of over 100 years of this Court's jurisprudence.[7] Furthermore, other than increasing the amount-in-controversy threshold to establishing federal jurisdiction, the relevant text of section 1332 and the federal court's diversity jurisdiction has remained essentially unchanged by Congress since the statute was originally enacted.

It is settled that "[t]he policy of the [diversity] statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). Without any intervening congressional amendment of the diversity statute, it would be inappropriate for this Court to revisit the holdings where "Congress, with complete understanding of how the courts had construed the statute, had not changed the governing language and down through the years had continued to specify and had progressively increased the jurisdictional amount necessary for instituting suit in the federal courts." *Zahn*, 414 U.S. at 300; *see also id.* at 301 (same).

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7. *See, e.g., Zahn*, 414 U.S. at 295; *Snyder*, 394 U.S. at 336; *Rogers v. Hennepin County*, 239 U.S. 621, 622 (1916); *Wheless v. City of St. Louis*, 180 U.S. 379, 382 (1901); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 147-48 (1832).

Further, Petitioners' arguments concerning the merits of the reach of diversity jurisdiction in class actions (*see* Pet. at 14-19), no matter how reasonable or sound, are simply foreclosed by the Court's rulings interpreting the language of the diversity statute as applied to class actions. Indeed, if Congress chooses to, it can and should amend section 1332 to correct any perceived error. *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."). In this regard, it is significant to note that S. 1712 and H.R. 2341 (the "Class Action Fairness Act of 2001") are presently pending before Congress. These bills seek to amend 28 U.S.C. § 1332 to federalize class actions and modify the amount-in-controversy requirements. In fact, since at least 1998, Congress has been attempting to amend the diversity statute as applied to class actions because several legislators perceive, just as Petitioners do, the need to amend the diversity statute to undo the effect the of this Court's holdings in *Snyder* and *Zahn* and the historic understanding of section 1332's amount-in-controversy requirement.[8] If enacted, the Class Action Fairness Act would establish the new rules of federal jurisdiction in class actions that Petitioners ask this Court to write.[9] The prudent course for this Court would be

8. A similar bill, each one entitled "Class Action Fairness Act of [Year]", has been introduced in the House and Senate every year since 1998.

9. In relevant part, the Act would modify section 1332 to read:

> (d) (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value
>
> (Cont'd)

to await congressional action before uprooting its long-standing decisions that have interpreted the diversity statute.

(Cont'd)

> of $2,000,000, exclusive of interest and costs, and is a class action in which —
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> . . .
>
> (d) (4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interests and costs.

Resp. App. at 16a-17a; 38a-39a.

The Act would also amend the removal statute to include a provision to make most orders remanding a class action to state court immediately appealable. Thus, contrary to Petitioners' contention, there would be ample opportunity for this Court and other courts to interpret "these important issues" as the law develops and percolates throughout the judiciary. *See* Resp. App. at 20a-21a; 42a-43a.

II. THERE IS NO CONFLICT BETWEEN OR CONFUSION AMONG THE CIRCUITS ON THE ROLE OF PUNITIVE DAMAGES IN DETERMINING WHETHER SUCH DAMAGES SATISFY THE AMOUNT-IN-CONTROVERSY REQUIREMENT UNDER THE DIVERSITY STATUTE IN CLASS ACTIONS

In an attempt to convince the Court to grant the writ, Petitioners argue that there is confusion in the lower courts and an alleged conflict between the court of appeals on the issue of aggregation of punitive damages in the class action context. In support of this contention, Petitioners erroneously assert that a trail of decisions within the Fifth Circuit conflict both within the circuit and without, and have fostered confusion among the lower courts. The principal cases relied on by Petitioners are *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995); *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596 (5th Cir. 1998). However, as is explained below, Petitioners' argument is flawed. All circuit courts of appeal unanimously agree that punitive damages sought by a class may not be aggregated to satisfy the amount-in-controversy requirement.

The issue resolved in *Allen*,[10] the case that is seemingly the lynchpin to Petitioners' argument, was whether aggregation of punitive damages was permissible under Mississippi law in a case involving multiple plaintiffs, *but which was not a class action*. Indeed, the Fifth Circuit

10. In *Allen*, 512 plaintiffs joined together to assert tort claims in a Mississippi state court against the defendants for damages resulting from an explosion and release of toxic fumes. 63 F.3d at 1329.

specifically noted this salient fact upfront stating "the suit is not a class action. . . ."[11] Based on the court's interpretation of Mississippi law, the court concluded "the unique nature of these awards requires, at least in Mississippi, that the full amount of alleged damages be counted against each plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333.

Allen, however, is not the law of the Fifth Circuit with regard to class actions and aggregation of punitive damages, nor is it even the law of the circuit generally. Instead, *Allen* is an anomalous decision based on the peculiarities of Mississippi law. First, in the class action context, the law of the Fifth Circuit pertaining to aggregation of punitive damages to satisfy jurisdictional requirements has been settled since 1978 when a panel of the court decided *Lindsey*. In *Lindsey*, the court considered "the claims of several plaintiffs, suing as members of a class," and relying on *Snyder* and *Zahn*, concluded that the claims, which included punitive damages, could not "be aggregated for the purpose of satisfying this jurisdictional predicate." 576 F.2d at 594. Thus, *Lindsey*, the law of the circuit, is in line with this Court's jurisprudence and the law within all circuits.

Second, the *Allen* panel itself substantially circumscribed the reach of its holding. In response to a Petition for Rehearing and Suggestion for Rehearing En Banc, the *Allen* panel stated:

11. *See also Addison v. Illinois Cent. R.R.*, 967 F. Supp. 173, 176 (E.D. La. 1997) (noting *Allen* did not involve a class action and holding punitive damages may not be aggregated to satisfy the jurisdictional amount-in-controversy).

> The panel is of the unanimous view that the opinion in this case specifically reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state.

Allen v. R & H Oil & Gas Co., 70 F.3d 26, 26 (5th Cir. 1995). And, approximately three years after the *Allen* decision, a different panel of the Fifth Circuit decided *Ard* and conclusively confirmed that *Allen* was predicated on the peculiar nature of punitive damages under Mississippi law. *Ard*, 138 F.3d at 602. In fact, *Ard* specifically noted that *Allen* departed from *Lindsey*, the law of the circuit, "solely" because of the peculiar nature of Mississippi law. *Ard* continued stating that *Allen* "does not purport to establish a precedent for aggregation of punitive damage claims asserted under federal law or the law of any other state." *Id.* Consequently, *Ard* held that *Lindsey* is still the law of the Fifth Circuit and, like the Ninth Circuit here, refused to permit a class plaintiffs' punitive damage claim to be aggregated for purposes of determining the amount-in-controversy. *Id.*

Petitioners are thus incorrect in their assertion that the Fifth Circuit ever determined that a "class possesses a common and undivided interest in punitive damages" at any time, or that the anomalous *Allen* decision has not been harmonized within the circuit.[12] Furthermore, Petitioners are

12. As this Court recognized in *Davis v. United States*, 417 U.S. 333, 340 (1974), an intracircuit conflict is generally not a sufficient basis for granting certiorari. Indeed, it is the primary task of the court of appeals to reconcile its own internal difficulties. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("doubt about the respect to be accorded to a previous decision of a different panel should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification").

also incorrect that the Eleventh Circuit is in conflict with any circuit court of appeals, or that it is in a state of flux about this issue. In *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir.) *cert. denied*, 531 U.S. 957 (2000), the Eleventh Circuit resolved a similar short-term intracircuit confusion about *Allen* and *Lindsey*[13] and in the same way.

Today, every circuit court of appeals that has addressed the proper treatment of a class action for punitive damages in the amount-in-controversy determination has reached the same conclusion reached by the Ninth Circuit below: any potential punitive damages award must be divided *pro rata* among class plaintiffs and may not be aggregated to determine the amount in controversy. *See Gilman*, 104 F.3d at 1431 (2d Cir.); *Lindsey*, 576 F.2d 593 (5th Cir.); *H & D Tire & Auto Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) *cert. denied*, 122 S. Ct. 214 (2001); *Brand Name*, 123 F.3d at 608-09 (7th Cir.); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292 (10th Cir. 2001); *Cohen*, 204 F.3d at 1076 (11th Cir.). Thus, because the Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits are all in alignment on this issue, because all of these decisions follow the mandate established by this Court in *Snyder* and *Zahn*, and because there is no confusion or countervailing circuit court opinion,[14] there is no need to

13. *Lindsey*, being a pre-split Fifth Circuit opinion, is binding on the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

14. Petitioners attempt to create confusion where none exists by citing to district court opinions in the Sixth Circuit that have decided the issue differently. One opinion *Knauer v. Ohio State Life Ins. Co.*, 102 F. Supp.2d 443 (N.D. Ohio 2000), relied upon authority that is not even good law in the circuits in which the opinions were (Cont'd)

grant the writ or certiorari requested by Petitioners. Indeed, very recently this Court denied a similar request for certiorari to review this exact issue. *See Cohen*, 531 U.S. 957 (2000).

Incredibly, Petitioners argue that because so many circuit courts of appeal have decided this issue in a uniform manner, "further percolation" of this issue is unwarranted. Pet. at 23. The reason review should be denied is not that the issue is novel and thus needs to "percolate" through the courts. Instead, the Court should deny review precisely because the rule in question is a settled one that does not pose a conflict that might otherwise demand resolution.

Petitioners' remaining argument for review on this issue is that the Ninth Circuit's decision is incorrect. However, the alleged incorrectness of a rule of law on which all circuit courts agree does not seem a compelling basis for a grant of certiorari. Nevertheless, Petitioners' contention that the decision is wrong is unpersuasive.

Again, this Court has long held that class members' claims cannot be aggregated to satisfy the jurisdictional amount-in-controversy requirement under the diversity

(Cont'd)
originally issued. In fact, *Knauer* relied upon *Allen* — which, as is explained above, has been subsequently rejected by the Fifth Circuit itself — and the Eleventh Circuit's decision in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996), which was also immediately abrogated in relevant part by the Eleventh Circuit in *Cohen*, 204 F.3d at 1076. The other opinion cited by Petitioners, *Durant v. Servicemaster Co. Trugreen, Inc.*, 147 F. Supp.2d 744 (E.D. Mich. 2001), relied solely on *Knauer*. Other district courts within the Sixth Circuit now recognize the understandable mistake made by *Knauer*. *See, e.g., Bowers v. Jefferson Pilot Fin. Ins. Co.*, 166 F. Supp.2d 552, 558 (E.D. Mich. 2001).

statute unless the class has "a common and undivided interest" in the claim. *Snyder*, 394 U.S. at 335. Here, plaintiffs brought "separate and distinct" claims. Further, as Judge Posner has explained, punitive damage claims in multi-plaintiff suits are *not* "common and undivided" because "[a] plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant." *Brand Name*, 123 F.3d at 608-09. And, although there might be a constitutional limit to "piling on" punitive damage awards by different courts against a defendant for the same conduct, the constitutional argument is "unlikely to succeed to the point of converting entitlements to punitive damages from individual to collective entitlements." *Id.* at 609. Unless and until one appellate court accepts this novel idea, there is no reason for this Court to address the issue.[15]

15. Petitioners conclude by suggesting that *DaimlerChrsyler v. Gibson*, No. 01-688, presents similar issues to this action. Respondents admit that both cases involve the same or substantially the same punitive damages issue. However, Respondents fail to understand what impact a review of the so-called "1367/*Zahn* issue" could possibly have on this action. Supplemental jurisdiction is not an issue in this case. As noted already, the district court found that Petitioners failed to prove the requisite amount-in-controversy even for one plaintiff, and even under the either viewpoint rule. Pet. App. at 29a. Thus, there is no original jurisdiction upon which the other class members might be brought along. Accordingly, a stay of this action pending resolution of *DaimlerChrysler* is unwarranted.

CONCLUSION

For the foregoing reasons, the Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — S. 1712, CLASS ACTION FAIRNESS ACT OF 2001

107th CONGRESS
1st SESSION

§ 1712

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 15, 2001

MR. GRASSLEY (for himself, Mr. KOHL, MR. HATCH, MR. CARPER, MR. THURMOND, MR. CHAFEE, and MR. SPECTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE. — This Act may be cited as the "Class Action Fairness Act of 2001".

(b) REFERENCE — Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS. — The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Report on class action settlements.

Sec. 7. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. — Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the

fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have —

(A) harmed class members with legitimate claims and defendants that have acted responsibly; and

(B) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where —

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are —

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES. — The purposes of this Act are to —

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) In General. — Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114 — CLASS ACTIONS

"Sec.

"1711. Definitions.

"1712. Judicial scrutiny of coupon and other noncash settlements.

"1713. Protection against loss by class members.

"1714. Protection against discrimination based on geographic location.

"1715. Prohibition on the payment of bounties.

"1716. Clearer and simpler settlement information.

"1717. Notifications to appropriate Federal and State officials.

"§ 1711. Definitions

"In this chapter:

"(1) CLASS.— The term 'class' means all of the class members in a class action.

"(2) CLASS ACTION.— The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

"(3) CLASS COUNSEL.— The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(4) CLASS MEMBERS.— The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(5) PLAINTIFF CLASS ACTION.— The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(6) PROPOSED SETTLEMENT.— The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

"§ 1712. Judicial scrutiny of coupon and other noncash settlements

"The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

"§ 1713. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

"§ 1714. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1715. Prohibition on the payment of bounties

"(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater

share of the award to a class representative serving on behalf of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

"(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit a payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling the obligations of that person as a class representative.

"§ 1716. Clearer and simpler settlement information

"(a) PLAIN ENGLISH REQUIREMENTS.—Any court with jurisdiction over a plaintiff class action shall require that any written notice concerning a proposed settlement of the class action provided to the class through the mail or publication in printed media contain—

"(1) at the beginning of such notice, a statement in 18-point or greater bold type, stating 'LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE.';

"(2) a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the members of the class;

"(C) the legal consequences of being a member of the class action;

"(D) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defendants by the settlement;

"(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(E) any other material matter.

"(b) TABULAR FORMAT.—Any court with jurisdiction over a plaintiff class action shall require that the information described in subsection (a)—

"(1) be placed in a conspicuous and prominent location on the notice;

"(2) contain clear and concise headings for each item of information; and

"(3) provide a clear and concise form for stating each item of information required to be disclosed under each heading.

"(c) TELEVISION OR RADIO NOTICE.—Any notice provided through television or radio (including transmissions by cable or satellite) to inform the class members in a class action of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

"(1) describe the persons who may potentially become class members in the class action; and

"(2) explain that the failure of a class member to exercise his or her right to be excluded from a class action will result in the person's inclusion in the class action.

"§ 1717. Notifications to appropriate Federal and State officials

(a) DEFINITIONS—

"(1) APPROPRIATE FEDERAL OFFICIAL- In this section, the term 'appropriate Federal official' means—

"(A) the Attorney General of the United States; or

"(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) APPROPRIATE STATE OFFICIAL- In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

(c) DEPOSITORY INSTITUTIONS NOTIFICATION.—

"(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

"(2) STATE DEPOSITORY INSTITUTIONS.—In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined

in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

"(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

"(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED.—

"(1) IN GENERAL.—A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

"(2) LIMITATION. A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

"(3) APPLICATION OF RIGHTS.— The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

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"(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

"(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) Paragraph (2) shall not apply to any civil action in which—

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"(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(C) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

"(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the prerequisites of rule 23 of the

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

"(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed under this paragraph that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed action was pending.

(7) Paragraph (2) shall not apply to any class action that solely involves a claim—

"(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

"(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(9)(A) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) shall nevertheless be deemed a class action if—

"(i) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

"(ii) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

"(B)(i) In any civil action described under subparagraph (A)(ii), the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims of individual class members.

"(ii) Paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(i).

"(iii) Paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to any civil action described under subparagraph (A)(ii).".

(b) CONFORMING AMENDMENTS.—

(1) Section 1335 (a)(1) is amended by inserting "(a) or (d)" after "1332".

(2) Section 1603 (b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action.

"(d) PROCEDURE FOR REMOVAL.—Section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

"(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), an order remanding a class action to the State court from which it was removed shall be reviewable by appeal or otherwise.

"(f) EXCEPTION.—This section shall not apply to any class action that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).".

(b) REMOVAL LIMITATION.—Section 1446(b) is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"§ 1453. Removal of class actions.".

SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT.—The report under subsection (a) shall contain—

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that—

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS.—Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

APPENDIX B — H.R. 2341, CLASS ACTION FAIRNESS ACT OF 2001

107th CONGRESS

1st SESSION

H. R. 2341

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

June 27, 2001

Mr. GOODLATTE (for himself, Mr. BOUCHER, Mr. SENSENBRENNER, Mr. MORAN of Virginia, Mr. ARMEY, Mr. STENHOLM, Mr. HYDE, Mr. DOOLEY of California, Mr. BRYANT, Mr. HOLDEN, Mr. COX, Mr. CHABOT, Mr. CRAMER, Mr. OXLEY, Mr. SUNUNU, Mr. BACHUS, Mr. BARTLETT of Maryland, and Mr. GOSS) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Class Action Fairness Act of 2001".

(b) REFERENCE.—Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

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Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction of interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Appeals of class action certification orders.

Sec. 7. Effective date.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds as follows:

(1) Class action lawsuits are an important and valuable part of our legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have harmed class members with legitimate claims and defendants that have acted responsibly, and that have thereby undermined public respect for our judicial system.

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(3) Class members have been harmed by a number of actions taken by plaintiffs' lawyers, which provide little or no benefit to class members as a whole, including—

(A) plaintiffs' lawyers receiving large fees, while class members are left with coupons or other awards of little or no value;

(B) unjustified rewardsbeing made to certain plaintiffs at the expense of other class members; and

(C) the publication of confusing notices that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Through the use of artful pleading, plaintiffs are able to avoid litigating class actions in Federal court, forcing businesses and other organizations to defend interstate class action lawsuits in county and State courts where—

(A) the lawyers, rather than the claimants, are likely to receive the maximum benefit;

(B) less scrutiny may be given to the merits of the case; and

(C) defendants are effectively forced into settlements, in order to avoid the possibility of huge judgments that could destabilize their companies.

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(5) These abuses undermine our Federal system and the intent of the framers of the Constitution in creating diversity jurisdiction, in that county and State courts are—

(A) handling interstate class actions that affect parties from many States;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(6) Abusive interstate class actions have harmed society as a whole by forcing innocent parties to settle cases rather than risk a huge judgment by a local jury, thereby costing consumers billions of dollars in increased costs to pay forforced settlements and excessive judgments.

(b) PURPOSES.—The purposes of this Act are—

(1) to assure fair and prompt recoveries for class members with legitimate claims;

(2) to protect responsible companies and other institutions against interstate class actions in State courts;

(3) to restore the intent of the framers of the Constitution by providing for Federal court consideration of interstate class actions; and

(4) to benefit society by encouraging innovation and lowering consumer prices.

SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.

(a) IN GENERAL.—Part V is amended by inserting after chapter 113 the following:

"CHAPTER 114—CLASS ACTIONS

"Sec.

"1711. Judicial scrutiny of coupon and other noncash settlements.

"1712. Protection against loss by class members.

"1713. Protection against discrimination based on geographic location.

"1714. Prohibition on the payment of bounties.

"1715. Clearer and simpler settlement information.

"1716. Pleading requirements for class actions.

"1717. Definitions

"§ 1711. Judicial scrutiny of coupon and other noncash settlements

"The court may approve a proposed settlement under which the class members would receive noncash benefits or would otherwise be required to expend funds in order to obtain part or all of the proposed benefits only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.

"§ 1712. Protection against loss by class members

"The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member outweigh the monetary loss.

"§ 1713. Protection against discrimination based on geographic location

"The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

"§ 1714. Prohibition on the payment of bounties

"(a) IN GENERAL.—The court may not approve a proposed settlement that provides for the payment of a greater share of the award to a class representative serving on behalf

of a class, on the basis of the formula for distribution to all other class members, than that awarded to the other class members.

"(b) RULE OF CONSTRUCTION.—The limitation in subsection (a) shall not be construed to prohibit any payment approved by the court for reasonable time or costs that a person was required to expend in fulfilling his or her obligations as a class representative.

"§ 1715. Clearer and simpler settlement information

"(a) PLAIN ENGLISH REQUIREMENTS.—Any court with jurisdiction over a plaintiff class action shall require that any written notice concerning a proposed settlement of the class action provided to the class through the mail or publication in printed media contain—

"(1) at the beginning of such notice, a statement in 18-point Times New Roman type or other functionally similar type, stating 'LEGAL NOTICE: YOU ARE A PLAINTIFF IN A CLASS ACTION LAWSUIT AND YOUR LEGAL RIGHTS ARE AFFECTED BY THE SETTLEMENT DESCRIBED IN THIS NOTICE.';

"(2) a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the members of the class;

"(C) the legal consequences of being a member of the class;

"(D) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defendants by the settlement;

"(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(E) any other material matter.

"(b) TABULAR FORMAT.—Any court with jurisdiction over a plaintiff class action shall require that the information described in subsection (a)—

"(1) be placed in a conspicuous and prominent location on the notice;

"(2) contain clear and concise headings for each item of information; and

"(3) provide a clear and concise form for stating each item of information required to be disclosed under each heading.

"(c) TELEVISION OR RADIO NOTICE.—Any notice provided through television or radio (including transmissions by cable or satellite) to inform the class members in a class action of the right of each member to be excluded from the class action or a proposed settlement of the class action, if such right exists, shall, in plain, easily understood language—

"(1) describe the persons who may potentially become class members in the class action; and

"(2) explain that the failure of a class member to exercise his or her right to be excluded from a class action will result in the person's inclusion in the class action or settlement.

"§ 1716. Pleading requirements for class actions

"(a) PARTICULARITY.—In each class action, the complaint shall specify with particularity the nature and amount of all relief sought on behalf of any class member, and the nature of the injury allegedly caused to members of the class.

"(b) STATE OF MIND.—In any class action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or failure to act alleged to give rise to liability, state with particularity facts which, if proven, will demonstrate that the defendant acted with the required state of mind.

"(c) MOTION TO DISMISS.—STAY OF DISCOVERY—

"(1) DISMISSAL FOR FAILURE TO MEET PLEADING REQUIREMENTS.—In any class action, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of subsections (a) or (b) are not met.

"(2) STAY OF DISCOVERY.—In any class action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss or motion for judgment on the pleadings, unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

"§ 1717. Definitions

"In this chapter—

"(1) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States pursuant to rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed

to a district court of the United States that was originally filed pursuant to a State statute or rule of judicial procedure authorizing an action to be brought by one or more representatives on behalf of a class.

"(2) CLASS COUNSEL.—The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

"(3) CLASS MEMBERS.—The term 'class members' means the persons who fall within the definition of the proposed or certified class in a class action.

"(4) PLAINTIFF CLASS ACTION.—The term 'plaintiff class action' means a class action in which class members are plaintiffs.

"(5) PROPOSED SETTLEMENT.—The term 'proposed settlement' means an agreement that resolves claims in a class action, that is subject to court approval and that, if approved, would be binding on the class members.'.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711.".

SEC. 4. FEDERAL DISTRICT COURT JURISDICTION OF INTERSTATE CLASS ACTIONS.

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION.—Section 1332 is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection—

"(A) the term 'class' means all of the class members in a class action;

"(B) the term 'class action' means any civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons on behalf of a class;

"(C) the term 'class certification order' means an order issued by a court approving the treatment of a civil action as a class action; and

"(D) the term 'class members' means the persons who fall within the definition of the proposed or certified class in a class action.

"(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) Paragraph (2) shall not apply to any civil action in which—

"(A)(i) the substantial majority of the members of the proposed plaintiff class and the primary defendants are citizens of the State in which the action was originally filed; and

"(ii) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed;

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

"(C) the number of proposed plaintiff class members is less than 100.

"(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

"(6)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the requirements of rule 23 of the Federal Rules of Civil Procedure.

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

"(C) In any action that is dismissed under this paragraph and is filed by any of the original named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed under this paragraph that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed action was pending.

(7) Paragraph (2) shall not apply to any class action brought by shareholders that solely involves a claim that relates to—

"(A) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 193 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(B) the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(C) the rights, duties (including fiduciary duties), and obligations relating to or created by

or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).

"(8) For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

"(9) For purposes of this section and section 1453 of this title, a civil action that is not otherwise a class action as defined in paragraph (1)(B) of this subsection shall nevertheless be deemed a class action if—

"(A) the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief, and is not a State attorney general; or

"(B) monetary relief claims in the action are proposed to be tried jointly in any respect with the claims of 100 or more other persons on the ground that the claims involve common questions of law or fact.

In any such case, the persons who allegedly were injured shall be treated as members of a proposed plaintiff class and the monetary relief that is sought shall be treated as the claims

of individual class members. The provisions of paragraphs (3) and (6) of this subsection and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (A). The provisions of paragraph (6) of this subsection, and subsections (b)(2) and (d) of section 1453 shall not apply to civil actions described under subparagraph (B).'.

(b) CONFORMING AMENDMENTS.—

(1) Section 1335(a)(1) is amended by inserting "(a) or (d)" after "1332".

(2) Section 1603(b)(3) is amended by striking "(d)" and inserting "(e)".

SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.

(a) IN GENERAL.—Chapter 89 is amended by adding after section 1452 the following:

"§ 1453. Removal of class actions

"(a) DEFINITIONS.—In this section, the terms 'class', 'class action', 'class certification order', and 'class member' have the meanings given these terms in section 1332(d)(1).

"(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) WHEN REMOVABLE.—This section shall apply to any class action before or after the entry of a class certification order in the action.

"(d) PROCEDURE FOR REMOVAL.—The provisions of section 1446 relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action.

"(e) REVIEW OF ORDERS REMANDING CLASS ACTIONS TO STATE COURTS.—The provisions of section 1447 shall apply to any removal of a case under this section, except that, notwithstanding the provisions of section 1447(d), an order remanding a classaction to the State court from which it was removed shall be reviewable by appeal or otherwise.

"(f) EXCEPTION.—This section shall not apply to any class action brought by shareholders that solely involves—

"(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 and section 28(f)(5)(E) of the Securities Exchange Act of 1934;

"(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporatedor organized; or

"(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 and the regulations issued thereunder).'.

(b) REMOVAL LIMITATION.—Section 1446(b) is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"§ 1453. Removal of class actions.".

SEC. 6. APPEALS OF CLASS ACTION CERTIFICATION ORDERS.

(a) IN GENERAL.—Section 1292(a) is amended by inserting after paragraph (3) the following:

"(4) Orders of the district courts of the United States granting or denying class certification under rule 23 of the Federal Rules of Civil Procedure, if notice of appeal is filed within 10 days after entry of the order.'.

(b) DISCOVERY STAY.—All discovery and other proceedings shall be stayed during the pendency of any appeal taken pursuant to the amendment made by subsection (a), unless the court finds upon the motion of any party that specific discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of the enactment of this Act.

Supreme Court, U.S.
FILED
JAN 31 2002
CLERK

(16)

No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition presents two important and recurring questions concerning the jurisdiction of the federal courts to hear class actions, both of which have confounded and divided the lower courts: (1) what is the proper method for determining the amount in controversy in a class action seeking *injunctive relief*; and (2) what is the proper method for determining the amount in controversy in a class action seeking *punitive damages*. Respondents acknowledge that the first question warrants this Court's review, but suggest—erroneously—that it is not squarely presented by the facts of this case. Respondents' arguments against review of the second question also are unpersuasive. The prevailing approach in the courts of appeals erroneously restricts the availability of diversity jurisdiction over claims for punitive damages vastly in excess of the jurisdictional minimum.

1. Respondents recognize that this Court has not conclusively addressed whether a claim for injunctive relief may be evaluated from the defendant's perspective when determining the amount in controversy, *see* Opp. 1; they agree that the courts of appeals are divided on the question, *see id.* at 9-10; they acknowledge the "need for clarification" concerning the applicability of the "either viewpoint" rule in the class action context, *id.* at 2; and they concede that the issue "might merit consideration by this Court," *id.* at 12. Respondents contend, however, that the issue is not properly raised by this case. That is incorrect.

a. As the petition elaborates, some courts of appeals refuse to apply the "either viewpoint" rule in the class action context because of a perceived incompatibility with the non-aggregation principle of *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), whereas other courts—including in particular the Seventh Circuit—reconcile the "either viewpoint" rule with *Snyder* and *Zahn* by evaluating "the cost to each defendant

of an injunction running in favor of one plaintiff." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998). Respondents' principal argument (*see* Opp. 2, 12-13) is that the facts of this case do not satisfy the amount-in-controversy requirement even under the approach adopted by the Seventh Circuit in *In re Brand Name*. In particular, Respondents contend that Petitioners failed in the courts below to establish that the cost to them of complying with an injunction running in favor of one class member would exceed $75,000, and that this case thus does not implicate the division between those courts that apply this version of the "either viewpoint" rule in class actions and those courts that adhere to the "plaintiff's viewpoint" rule.

Respondents' argument is flatly incorrect, and reflects a fundamental misunderstanding of the district court's opinion.[1] Respondents rely entirely on the statement in the district court's opinion that Petitioners had "failed to show that the value of the injunction as to any one cardholder would exceed $75,000." Pet. App. 29a. In Respondents' apparent view, that statement shows that the district court found Petitioners had failed to prove the jurisdictional fact required by the *In re Brand Name* test, *i.e.*, that the cost of reinstituting the credit card program as to only one plaintiff would exceed $75,000. *See* Opp. 12. But that is simply a misreading of the district court's opinion.

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[1] It bears emphasis that Respondents' argument on this point also is entirely irrelevant to the case if, as the petition explains (*see* Pet. 17-19), the class claim for injunctive relief in this case is better understood as asserting a "common and undivided" interest rather than "separate and distinct" claims. The non-aggregation rule of *Snyder* and *Zahn* does not apply to "common and undivided" claims, *see Snyder*, 394 U.S. at 335; instead, the relevant measure in such cases is the cost of complying with the injunction for the entire class, which, in this case, undisputedly exceeds $75,000.

As explained in the petition (*see* Pet. 15-16), the district court received undisputed evidence establishing that the fixed costs of complying with the injunction sought by the plaintiff class—reinstitution of the credit card rebate program, restoration of the opportunity to accrue rebates with proper purchases, and reestablishment of the business apparatus for tracking such accrual—would far exceed $75,000, even if the relief were awarded only to a single plaintiff. The district court acknowledged the undisputed evidence in its opinion, citing testimony that "the fixed costs in operating a rebate program . . . exceed $75,000" and "would not depend on the extent of cardholder usage." Pet. App. 28a (internal quotation marks omitted). The district court did not question the veracity of this evidence—nor could it, since the evidence was entirely uncontroverted. Instead, the court concluded that such costs are legally irrelevant to the jurisdictional analysis in the context of a class action. *See id.* at 28a. In the court's view, because cardholders could only accrue a maximum of $3,500 in rebates under the program, the "value" of each individual cardholder's claim for injunctive relief could not exceed that amount. *See id.* at 28a-29a.[2]

The Ninth Circuit's treatment of the issue confirms that the district court's decision was based on a legal conclusion barring consideration of the fixed costs of reinstituting the

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[2] The district court appears to have erroneously equated the maximum rebate an individual cardholder could earn under the program with the cost of establishing and maintaining a program to track the accrual of such rebates. But Respondents did not sue for any liquidated rebate because of the discontinuation of the program; rather, they sought reinstatement of the *opportunity* to accrue rebates when they used their credit cards. That is, they sought "specific performance of the Rebate Program to plaintiffs and Class members." Pet. App. 28a (quoting Consolidated Complaint at 13). The cost of providing that relief to a single plaintiff is not the cost of paying a particular amount in rebates, but rather the cost of reinstating the rebate program, tracking that individual's accrual of rebates, and crediting him for rebates properly accrued.

program rather than a factual finding that those costs would not exceed $75,000 as to one plaintiff. Any such factual finding would have provided the Ninth Circuit with an obvious and straightforward basis for its decision. But the Ninth Circuit did not affirm the district court on factual grounds, nor did it even suggest that the district court had made any factual findings adverse to Petitioners on this point. Rather, the Ninth Circuit recited the uncontested evidence in Petitioners' *favor*, thus properly accepting that the costs of the injunctive relief even as to one plaintiff would exceed $75,000. *See* Pet. App. 12a. But the Ninth Circuit, as Respondents themselves describe the opinion, held "as a matter of law" that the fixed costs of complying with the injunction (even as to one plaintiff) "could not satisfy the amount-in-controversy requirement." Opp. 7.

That legal conclusion conflicts directly with the Seventh Circuit's decision in *In re Brand Name*, which made clear that the amount-in-controversy requirement may be satisfied by looking at "the cost to each defendant of an injunction running in favor of one plaintiff." 123 F.3d at 610. In rejecting that approach, the Ninth Circuit deepened the intercircuit conflict over whether, and how, the "either viewpoint" rule may be applied in the class action context.

b. Respondents submit that even if—as the undisputed evidence establishes—the cost of awarding injunctive relief to one plaintiff exceeds $75,000, "ministerial business costs" can never satisfy the amount-in-controversy requirement. Opp. 12. The costs at issue here, however, are in no sense merely "ministerial." The Seventh Circuit in *In re Brand Name* distinguished mere "clerical or ministerial costs of compliance," which might not count toward the jurisdictional minimum, from costs imposed by injunctions obliging a defendant to "restructure its business or give up a lucrative lawful business opportunity," which are properly included in the amount-in-controversy calculus. 123 F.3d at 610. As an example of the former, the court referred to "the cost of duplicating an injunction . . . and distributing the copies to all the relevant personnel." *Id.* Here, Petitioners would face far more than mere photocopying costs if required to reinstitute the credit card rebate program. At a minimum, Petitioners would be required to reestablish the business apparatus for tracking the accrual of rebates, maintain computer systems for verifying purchases and tracking the accrual of rebates, and employ people to operate these systems.[3]

c. Respondents' assertion (Opp. 15-16) that the underlying aim of the petition in this case is to "revisit" this Court's decisions in *Snyder* and *Zahn* is simply incorrect. Rather, this case presents an opportunity to *apply* the rule of *Snyder* and *Zahn* to class claims for injunctive relief, and to clarify whether, and how, the "either viewpoint" rule may be employed consistent with *Snyder* and *Zahn* in this context. And because *Snyder* and *Zahn*'s non-aggregation rule applies only to "separate and distinct" claims and not to claims asserting a "common and undivided" interest, *see Snyder*, 394 U.S. at 335, this case also presents an opportunity for the Court to clarify the proper application of these categories to class claims for injunctive relief. *See* Pet. 17-19 (explaining that the claim for injunctive relief in this case is better understood as "common and undivided").[4] As the petition shows,

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[3] Respondents' characterization of the injunction as requiring Petitioners only to "maintain[] the business status quo," Opp. 14, is inaccurate. The Consolidated Complaint requesting the injunction was filed after Petitioners had terminated the rebate accrual program. *See* Pet. App. 3a-4a. Thus, complying with the requested injunction in this case would not simply require continuing a program that is already in place or even restarting a program that is ready to go. Rather, it would entail reassembling the infrastructure and personnel necessary to reinstitute a program that ceased to exist four years ago. Petitioners would thus face not only the ongoing costs of maintaining the rebate accrual program, but also the substantial start-up costs associated with recreating the program.

[4] Respondents appear to suggest (Opp. 5 n.2) that Petitioners failed to argue before the court of appeals that the class claims for injunctive relief and for punitive damages are "common and undivided" rather than

these questions have divided the lower courts, and this Court's review is warranted to resolve them conclusively.[5]

2. The lower court opinions analyzing the proper treatment of punitive damages in the amount-in-controversy determination have reached conflicting conclusions, and the prevailing approach—which the Ninth Circuit followed below—is incorrect. Respondents' understanding of the relevant opinions is flawed. Moreover, Respondents offer no serious defense of the erroneous conclusion of the Ninth Circuit and other courts of appeals that punitive damages should be apportioned among the plaintiffs on a *pro rata* basis, which, as the petition explains (*see* Pet. 28), has the effect of revoking federal jurisdiction over claims that satisfy the jurisdictional amount requirement.

a. The Fifth Circuit concluded in *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), that plaintiffs possess a common and undivided interest in obtaining punitive dam-

"separate and distinct," but that suggestion is manifestly incorrect. *See* Pet. App. 10a ("Ford and Citibank first contend that the consolidated plaintiffs have a 'common and undivided interest' in the injunctive relief they seek."); *id.* at 15a ("Ford and Citibank argue that . . . the punitive damages sought in this case are a single collective right in which plaintiffs have a common and undivided interest.").

[5] Respondents' suggestion that this Court "await congressional action" amending the diversity statute rather than granting the petition in this case, Opp. 16-17, is unpersuasive. This Court's exercise of its certiorari jurisdiction is not affected by the mere introduction of proposed legislation in Congress. Moreover, while bills proposing modifications to the diversity statute have been introduced in Congress for several years, none have approached enactment (*see* Opp. 16 n.8), and Respondents provide no basis for believing that the bills introduced this year will fare differently. Indeed, the Senate has not scheduled any hearings on the matter. Finally, even if the proposed legislation were to pass, it would not affect cases outside the class action context. But the jurisdictional questions presented in this case arise in any case involving multiple plaintiffs, including where plaintiffs file suit together pursuant to conventional joinder rules rather than in a class action.

ages, and the Eleventh Circuit soon followed suit, *see Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357-59 (11th Cir. 1996). While those courts have since limited that conclusion based on the "prior panel decision" rule, the prior decision in question, *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978), does not purport to assess the merits of the issue. *See* Pet. 21-22. As a result, the only decisions in those courts to examine the merits of the question have found that punitive damages implicate a common and undivided interest. In addition, *Allen* remains binding in the Fifth Circuit at least in certain situations. *See Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998) (*Allen* governs in cases involving Mississippi law).

Respondents suggest that, for two reasons, the Fifth Circuit's analysis in *Allen* does not conflict with the opinion below. First, Respondents stress, *Allen* was not a class action, and instead involved the joinder of 512 plaintiffs. *See* Opp. at 18-19. But the treatment of punitive damages in the amount-in-controversy determination cannot vary with whether the circumstances involve the joinder of multiple plaintiffs or a class action. After all, the whole point of *Snyder* and *Zahn* is that the same amount-in-controversy rules that govern in actions involving joinder of multiple plaintiffs also control in class actions. *See Zahn*, 414 U.S. at 294-300; *Snyder*, 394 U.S. at 336-37 ("no reason to treat" class actions "differently from joined actions for purposes of aggregation"); *id.* at 340 ("[a]ny change in the doctrine of aggregation in class actions . . . would inescapably have to be applied as well to . . . joinder"). Accordingly, the Fifth Circuit decisions limiting *Allen*—all of which involve class actions—contain no suggestion that *Allen* is distinguishable on the basis that it involved the joinder of multiple plaintiffs.

Respondents also submit (*see* Opp. 19-20) that *Allen* turned on considerations unique to Mississippi law, based on the panel's statement that its opinion "reflects a result under

the Mississippi law of punitive damages" and does not necessarily control in cases "aris[ing] under the law of any other state." *Allen*, 70 F.3d at 26. Yet Mississippi's law of punitive damages is hardly unusual. To the contrary, *Allen* recognizes that "Mississippi's controlling law on punitive damages follows the majority rule" in serving the "fundamentally collective" interests of "punishing and deterring wrongdoing." 63 F.3d at 1332-33. But because some states have a different rationale for punitive damages, *see generally* John B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1126-30 (1984), the panel in *Allen* understood that its decision would not necessarily govern where punitive damages serve other purposes. And subsequent decisions limit *Allen*'s application to cases involving Mississippi law not because there is anything anomalous about Mississippi's punitive damages law, but because of the prior panel precedent rule.

The result is not only that the analysis in *Allen* conflicts with the Ninth Circuit's decision below, but also that the controlling rule in the Fifth Circuit conflicts with the controlling rule in the Ninth Circuit and other courts of appeals. In the Fifth Circuit, punitive damages implicate a common and undivided interest at least where Mississippi law applies. In contrast, the rule in the Ninth Circuit and in other courts of appeals is that plaintiffs *never* possess a common and undivided interest in punitive damages, and that punitive damages are always apportioned *pro rata* among the plaintiffs.[6]

b. Even assuming that the lower courts were in full agreement on the treatment of punitive damages in the amount-in-controversy determination, this Court still should

[6] Because there is nothing unusual about the law of punitive damages in Mississippi, the Ninth Circuit and other courts that have adopted a blanket rule requiring apportionment of punitive damages on a *pro rata* basis would necessarily also apply that rule when confronting claims arising under Mississippi law.

grant certiorari because the issue is a highly important one and the prevailing rule is erroneous. *See, e.g., Eastern Enter. v. Apfel*, 524 U.S. 498, 519 (1998) (granting review based on importance of issue notwithstanding unanimity among courts of appeals, and rejecting unanimous view).[7] The rapid rise in extraordinary punitive damages verdicts against corporate defendants is well established, and this Court has frequently recognized the danger of excessive punitive damages awards against out-of-state businesses, *see Honda v. Oberg*, 512 U.S. 415, 432 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality); *id.* at 493 (O'Connor, J., dissenting). As a result, the availability of a federal forum in diversity jurisdiction for suits seeking punitive damages against nonresident corporations presents a highly significant question. Because the competing views are fully developed in circuit court opinions adopting opposite positions on the merits, there is no need to await further elaboration of the issues.

As the petition explains (Pet. 24-28), moreover, the rule adopted by the Ninth Circuit below and by other courts of appeals is incorrect. First, the claims of a plaintiffs' class for punitive damages are generally common and undivided, and so the class-wide award—rather than the eventual *pro rata* distribution—should be attributed to each plaintiff. That is because, whereas each plaintiff has a separate and distinct entitlement to compensatory relief for his or her individual injuries, punitive damages normally serve collective societal interests in punishment and deterrence. The sole response in

[7] Of course, if the Court grants certiorari to review the first question presented by the petition, there would be no reason not to grant review of the second question as well: the two questions present complementary issues concerning the proper application of *Snyder* and *Zahn*; the Court would have the opportunity to address—in a case already before it—a significant question as to which the courts of appeals are in error; and the Court's review of both questions would ensure a more complete and definitive resolution of the jurisdictional questions in this case.

the brief in opposition is that the recovery of punitive damages by one plaintiff does not necessarily foreclose a subsequent award to a different plaintiff for the same conduct. *See* Opp. 23. But this Court's decisions have not viewed the availability of relief in a subsequent action as a salient consideration. Instead, the Court weighs such factors as whether the defendant separately contests the claims of each individual plaintiff or instead contests only the overall award (with no interest in its apportionment among the plaintiffs), and whether the recovery of each plaintiff rests on separate evidence or instead depends on recovery by the others. *See* Pet. 25-26. Consideration of those factors in this case compels the conclusion that class plaintiffs have a common and undivided claim for recovery of punitive damages.

What is more, even if each plaintiff has a separate and distinct claim for punitive damages, the rule adopted by the Ninth Circuit below and by other courts of appeals—*viz.*, that punitive damages must be apportioned *pro rata* among class plaintiffs—still is plainly incorrect. As the petition explains (*see* Pet. 27-28), the relevant amount is not the eventual *pro rata* distribution to each plaintiff in the class, but rather the value of a plaintiff's claim for punitive damages if brought in a *separate action*. And because a single plaintiff could recover in a separate action the entire amount necessary to punish and deter the defendant's conduct, the amount in controversy should approach the size of the class-wide award, not the size of the *pro rata* distribution. The rule adopted by the Ninth Circuit below and other courts of appeals thus greatly undervalues the amount in controversy in a class claim for punitive damages, and effectively revokes federal jurisdiction over jurisdictionally sufficient claims.

CONCLUSION

For the foregoing reasons and the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 19, 2001
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APPENDIX A

U.S. District Court -- Western Washington (Seattle)
CIVIL DOCKET FOR CASE #: 98-MD-1199
In re: Ford Motor Co/Citibk

[Caption matter omitted]
[Docket as of December 5, 2001 3:13 am]

1/9/98	1	ORDER from Multidistrict Litigation Judicial Panel re: Transfer Order to the Western District of Washington at Seattle and assigned to Judge William L. Dwyer. Our MDL Case No. is MDL 1199. LIST OF CASES FROM OTHER COURTS AS FOLLOWS: 1. Northern Dist. of Illinois-Eastern Division - 97-cv-5627, John B. McCauley vs. Ford Motor et al (Our Case No. Assigned is C98-151WD); 2. Eastern Distroct of New York (Brooklyn) - 97-cv-4648, Essig et al vs. Ford Motor (Our Case No. Assigned is C98-152WD); 3. District of Oregon - 97cv1186, Merrick vs. Ford Motor Co et al (Our Case No. Assigned is C98-153WD); 4. Central District of CA (Western Division) - 97-cv-9198 La Grou vs. Ford Motor Co et al (Our Case No. Assigned is C98-226WD); 5. Our Case - Western District of WA at Seattle - C97-1293WD. (cc: counsel, Judge, MDL) (md) [Entry date 03/31/98] [Edit date 03/31/98]
1/9/98	--	ENT- Reference must be made to the individual docket sheet for entries relating only to individual actions. (md) [Entry date 03/31/98]

4/1/98	2	LETTER, to the individual courts that will be transferring cases to the Western Dist of Wa at Seattle re MDL 1199, In Re: Ford Motor Company/Citibank NA Cardholder Rebate Program Litigation. Attached is a certified copy of the Order from the MDL Panel w/a list of cases and our case numbers. (md)
4/1/98	3	LETTER from Deputy Clerk, dated 4/1/98 to all cnsl of record re: General Court Rules as to MDL and individual cases and Western Dist of Wa Local Rules. (md)
4/9/98	4	LETTER from Thomas Boeder, dated 4/8/98 re: Thomas Boeder and Margaret McKeown are partners at Perkins Coie (Docket reflects Correct address per letter head.) (md) [Entry date 04/13/98]
6/4/98	5	MOTION by plaintiffs' for order/entry of pretrial order no. 1 (md) [Entry date 06/05/98]
6/4/98	6	MEMORANDUM by plaintiff in support of motion for order/entry of pretrial order no. 1 [5-1] (md) [Entry date 06/05/98]
6/4/98	--	LODGED ORDER: re: motion for order/entry of pretrial order no. 1 [5-1] (md) [Entry date 06/05/98]
6/4/98	7	AFFIDAVIT OF SERVICE by plaintiff of motion for order/entry of pretrial order no. 1 [5-1] (md) [Entry date 06/05/98]
6/12/98	11	ORDER (certified) from MDL Panel adding Ricky A. Copeland vs. Ford Motor Co, Northern Dist of Alabama, Case No. 7:97-2666. to MDL-1199. (notified all cnsl of record and MDL with a copy of letter/docket sheet) (cc: counsel, Judge, MDL Panel) (md) [Entry date 06/18/98]

6/15/98	8	RESPONSE by defendant to Pltf's motion for entry of Pretrial Order No. 1 [0-0] (md) [Entry date 06/16/98]
6/15/98	--	LODGED ORDER: re: consideration of Pretrial Order No. 1 [8-1] (md) [Entry date 06/16/98]
6/15/98	9	AFFIDAVIT OF SERVICE by defendant of motion response [8-1] (md) [Entry date 06/16/98]
6/15/98	10	MEMORANDUM by plaintiff Jeffrey Scott Merrick in response to pltfs' motion for entry of Pretrial Order No. 1 (md) [Entry date 06/16/98]
6/18/98	--	REPLY by plaintiff in support of motion for entry of pretrial order no. 1 [0-0] (md) [Entry date 06/19/98]
6/18/98	13	REPLY by plaintiff in support of motion for entry of pretrial Order No. 1 [0-0] (md) [Entry date 06/19/98]
6/18/98	--	LODGED ORDER: re: proposed amended pretrial order no. 1 [13-1] (md) [Entry date 06/19/98]
6/18/98	14	AFFIDAVIT OF SERVICE by plaintiff of reply [13-1] (md) [Entry date 06/19/98]
6/22/98	15	ORDER by Judge William L. Dwyer DENYING pltf's motion for order/entry of pretrial order no. 1 [5-1]. Ordered that cnsl for all parties shall meet and confer on or before 7/6/98 to negotiate the terms of a case management order to govern this consolidated litigation; the parties shall submit a stipulated case management order on or before 7/9/98 covering all matters as to which the parties have reached. Pltf's motion for entry of

		pretrial order no. 1 is denied without prejudice. (cc: counsel, Judge) (md)
6/27/98	16	LETTER by defendant Citibank (SD) NA re: removing attorney Margaret McKeown who is now a judge on the Ninth Circuit Court of Appeals. (md) [Entry date 06/29/98]
7/16/98	--	LODGED ORDER: case management order (rs) [Entry date 07/17/98]
7/22/98	17	CASE MANAGEMENT ORDER by Judge William L. Dwyer (cc: counsel, Judge) (rs)
8/5/98	18	COMPLAINT (consolidated) (md) [Entry date 08/10/98]
8/5/98	19	AFFIDAVIT OF SERVICE by plaintiff of consolidated complaint [18-1] (md) [Entry date 08/10/98]
9/8/98	20	MOTION by defendants to dismiss all claims for failure to state a claim (md) [Entry date 09/09/98]
9/8/98	--	PROPOSED memorandum in support of re: motion to dismiss all claims for failure to state a claim [20-1] (md) [Entry date 09/09/98]
9/8/98	--	LODGED ORDER: re: motion to dismiss all claims for failure to state a claim [20-1] (md) [Entry date 09/09/98]
9/8/98	21	MOTION by defendants' for leave to file an overlength brief in support of motion to dismiss (md) [Entry date 09/09/98]
9/8/98	22	MEMORANDUM by defendant in support of motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/09/98]

9/8/98	--	LODGED ORDER: re: motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/09/98]
9/8/98	23	AFFIDAVIT OF SERVICE by defendant of motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/09/98]
9/9/98	24	RESPONSE by plaintiff to motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/10/98]
9/9/98	25	AFFIDAVIT OF SERVICE by plaintiff of motion response [24-1] (md) [Entry date 09/10/98]
9/14/98	26	ORDER by Judge William L. Dwyer GRANTING defts' motion for leave to file an overlength brief in support of motion to dismiss [21-1] (cc: counsel, Judge) (md)
9/14/98	27	MEMORANDUM by defendant in support of motion to dismiss all claims for failure to state a claim [20-1] (md)
9/18/98	28	NOTICE from attorney Monika Vasil that the following is RE-NOTED FOR 10/30/98 motion to dismiss all claims for failure to state a claim. Pltfs' response due 10/8/98 and reply due 10/23/98. (md)
10/8/98	29	MEMORANDUM by plaintiff in opposition to motion to dismiss all claims for failure to state a claim [20-1] Oral Argument Requested (md) [Entry date 10/09/98]
10/8/98	30	DECLARATION of Erin K. Flory re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 31 DECLARATION of John McCauley re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 32 DECLARATION of Howard Hornreich re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 33 DECLARATION of Lynette Hornreich re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 34 AFFIDAVIT of Thomas Walters re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 35 AFFIDAVIT of Gerald Essig re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 36 APPENDIX/WORKING PAPAERS filed by plaintiff re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 37 AFFIDAVIT OF SERVICE by plaintiff of memorandum [29-1] (md) [Entry date 10/09/98]

10/9/98 38 PRAECIPE: by plaintiffs to replace page 4 of the memorandum in opposition to defts' motion to dismiss [29-1] (md) [Entry date 10/13/98]

10/9/98 39 AFFIDAVIT OF SERVICE by plaintiff of praecipe [38-1] (md) [Entry date 10/13/98]

10/22/98 40 MINUTE ORDER: by Judge William L. Dwyer ; Brief status report ddl set for 10/30/98 (cc: counsel, Judge) (md)

10/23/98 41 REPLY memorandum by defendant Ford Motor Company, defendant Citibank in support of motion to dismiss claims for failure

to state a claim [20-1] (md) [Entry date 10/26/98]

10/23/98 42 AFFIDAVIT OF SERVICE by defendant of reply [41-1] (md) [Entry date 10/26/98]

10/30/98 43 JOINT STATUS REPORT filed by all parties. (md) [Entry date 11/02/98]

10/30/98 44 AFFIDAVIT OF SERVICE by plaintiff of joint status report [43-1] (md) [Entry date 11/02/98]

11/24/98 45 ORDER by Judge William L. Dwyer DENYING defts' motion to dismiss all claims for failure to state a claim [20-1] (cc: counsel, Judge) (md)

12/14/98 46 ANSWER to consolidated complaint [18-1] by defendant Ford Motor Company, jury demand (md) [Entry date 12/15/98]

12/14/98 47 AFFIDAVIT OF SERVICE by defendant Ford Motor Company of answer [46-1] (md) [Entry date 12/15/98]

12/14/98 48 ANSWER to complaint [18-1] by defendant Citibank (SD) NA (md) [Entry date 12/15/98]

12/14/98 49 AFFIDAVIT OF SERVICE by defendant Citibank (SD) NA of answer [48-1] (md) [Entry date 12/15/98]

1/11/99 -- LODGED ORDER: Confidentiality order (md) [Entry date 01/12/99]

1/12/99 50 PROTECTIVE ORDER/CONFIDENTIALITY ORDER by Judge William L. Dwyer : (cc: counsel, Judge) (md)

1/22/99	51	MINUTE ORDER: by Judge William L. Dwyer scheduling conference/hrg set for 2:00 2/4/99 (cc: counsel, Judge, Eileen) (md)
1/23/99	53	LETTER by plaintiff Ricky A Copeland re: correction of cnsl of record (md) [Entry date 01/27/99]
1/25/99	52	STIPULATION and ORDER by Judge William L. Dwyer, deadline for responses to discovery requests currently outstanding is extended to 2/8/99. Deadline for all class certification discovery is extended to 3/10/99. Other deadlines shall cont to be governed by the Cse management order, as amended by the forgoing. (cc: counsel, Judge, Eileen) (md) [Entry date 01/26/99]
2/4/99	54	MINUTE ORDER: by Judge William L. Dwyer, in view of the procedural and scheduling orders applicable to all of these cases, the case specific scheduling order entered on 9/30/97 in Hornreich vs. Ford Motor is vacated (cc: counsel, Judge) (md) [Entry date 02/05/99]
2/4/99	55	MINUTE ORDER: by Judge William L. Dwyer, in view of the stipulated order establishing certain dates entered on 1/25/99, a scheduling conference is not necessary at this point, and the conference previously scheduled on 2/4/99 is canceled. Cnsl have been notified by this by telephone and have concurred (cc: counsel, Judge) (md) [Entry date 02/05/99]
2/4/99	--	MAIL RETURNED: re: order [50-1] addressed to Alfred M. Swanson (md) [Entry date 02/05/99]

3/4/99	--	MAIL RETURNED: re: stipulation [52-2] addressed to Alfred M. Swanson Jr (md) [Entry date 03/05/99]
3/10/99	56	STIPULATION/MOTION to extend discovery (md) [Entry date 03/11/99]
3/10/99	--	LODGED ORDER: re: stipulation [56-1] (md) [Entry date 03/11/99]
3/10/99	57	AFFIDAVIT OF SERVICE by In re of stipulation to extend discovery [56-1] (md) [Entry date 03/11/99]
3/11/99	58	STIPULATION and ORDER by Judge William L. Dwyer ; class certification discovery ddl extended to 4/6/99 (cc: counsel, Judge) (md)
4/9/99	59	MOTION by plaintiff to certify class action NOTED FOR 5/28/99 (md) [Entry date 04/12/99]
4/9/99	60	MEMORANDUM by plaintiff in support of motion to certify class action [59-1] (under seal) (md) [Entry date 04/12/99]
4/9/99	61	DECLARATION of Steve W. Berman re motion to certify class action [59-1] (md) [Entry date 04/12/99]
4/9/99	62	EXHIBITS/CONPENDIUM OF DEFTS INTERNAL DOCUMENTS designated as confidential in support of pltfs' memorandum [60-1] (under seal) (md) [Entry date 04/12/99]
4/9/99	--	LODGED ORDER: re: motion to certify class action [59-1] (md) [Entry date 04/12/99]
4/9/99	63	AFFIDAVIT OF SERVICE by plaintiff of motion to certify class action [59-1] (md) [Entry date 04/12/99]

4/30/99	--	LODGED ORDER: stipulation and order re: 30 day extension fur submission of defts' opposition to pltfs' motion for class certification. (md) [Entry date 05/04/99]
4/30/99	64	AFFIDAVIT OF SERVICE re: stipulation and order (md) [Entry date 05/04/99]
5/5/99	65	STIPULATION and ORDER by Judge William L. Dwyer : that defts will file brief in opposition to class certification. RE-NOTED FOR 6/11/99 motion to certify class action [59-1] (cc: counsel, Judge) (md)
5/11/99	66	MINUTE ORDER: by Judge William L. Dwyer RE- NOTED FOR 6/18/99 motion to certify class action. Any reply will be due on 6/17/99 [59-1] (cc: counsel, Judge) (md) [Entry date 05/12/99]
6/7/99	--	LODGED ORDER: stipulation and order to extend for submission of defts opposition to pltfs' motion for class certification (md) [Entry date 06/08/99]
6/7/99	67	AFFIDAVIT OF SERVICE by defendant of order lodged [0-0] (md) [Entry date 06/08/99]
6/8/99	68	STIPULATION and ORDER by Judge William L. Dwyer, defts will file their brief in opposition to class certification on 6/9/99 (cc: counsel, Judge) (md)
6/9/99	69	MOTION by defendant Citibank for leave to file overlength brief in opposition to pltfs' motion for class certification (md) [Entry date 06/10/99] [Edit date 06/10/99]
6/9/99	70	MEMORANDUM by defendant Citibank in support of motion for leave to file overlength brief in opposition to pltfs' motion for class

certification [69-1] (md) [Entry date 06/10/99] [Edit date 06/10/99]

6/9/99	--	LODGED ORDER: re: motion for leave to file overlength brief in opposition to pltfs' motion for class certification [69-1] (md) [Entry date 06/10/99] [Edit date 06/10/99]
6/9/99	--	PROPOSED defts opposition to pltfs' motion for class certification (under seal) re: motion for leave to file overlength brief in opposition to pltfs' motion for class certification [69-1] (md) [Entry date 06/10/99]
6/10/99	71	ORDER by Judge William L. Dwyer GRANTING defts' motion for leave to file overlength brief in opposition to pltfs' motion for class certification [69-1] (cc: counsel, Judge) (md) [Entry date 06/11/99]
6/10/99	72	MEMORANDUM by defendant Ford Motor Company, defendant Citibank in opposition to motion to certify class action [59-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	73	DECLARATION of Michael D. Pratt and expert report and exhibits re: memorandum [72-1] (md) [Entry date 06/11/99]
6/10/99	74	APPENDIX Volm I filed by defendant re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	75	APPENDIX Volm II filed by defendant re: memorandum [72-1] (md) [Entry date 06/11/99]
6/10/99	76	DECLARATION of Sheryl Behar re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]

6/10/99	77	DECLARATION of Marshall G. Greenberg re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	78	DECLARATION of Joel B. Cohen re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	--	LODGED ORDER: re: order denying pltfs' motion for class certification [72-1] (md) [Entry date 06/11/99]
6/10/99	79	AFFIDAVIT OF SERVICE by defendant of memorandum [72-1] (md) [Entry date 06/11/99]
6/17/99	--	LODGED ORDER: stipulation and order for extension of time to file reply brief (md) [Entry date 06/18/99]
6/17/99	80	AFFIDAVIT OF SERVICE by In re of order lodged [0-0] (md) [Entry date 06/18/99]
6/18/99	81	STIPULATION and ORDER by Judge William L. Dwyer for an 11 day extension for filing of pltfs' reply brief in support of class certification. (cc: counsel, Judge) (md)
6/18/99	82	MINUTE ORDER: by Judge William L. Dwyer RE- NOTED FOR 7/2/99 motion to certify class action [59-1] (cc: counsel, Judge) (md)
6/22/99	--	MAIL RETURNED: re: order [71-1] addressed to Michael J. Rosenfeld (md) [Entry date 06/23/99]
6/25/99	--	MAIL RETURNED: re: stipulation [68-1] addressed to Alfred M. Swanson Jr (md) [Entry date 06/28/99]

6/28/99	83	MOTION by In re pltfs' for leave to file overlength reply brief NOTED FOR 7/16/99 (md) [Entry date 06/29/99]
6/28/99	84	MOTION by plaintiffs' to shorten time on [84-1] motion for leave to file overlength reply brief [83-1] NOTED FOR 6/29/99 (md) [Entry date 06/29/99]
6/28/99	--	LODGED ORDER: re: motion to shorten time on motion for leave to file overlength reply brief [83-1] [84-1] (md) [Entry date 06/29/99]
6/28/99	--	LODGED ORDER: re:amended order granting pltfs' motion to certify class action [59-1] (md) [Entry date 06/29/99]
6/28/99	--	PROPOSED pltfs' reply memo re: motion for leave to file overlength reply brief [83-1] (md) [Entry date 06/29/99]
6/28/99	85	AFFIDAVIT OF SERVICE by plaintiff of motion for leave to file overlength reply brief [83-1] (md) [Entry date 06/29/99]
6/30/99	86	ORDER by Judge William L. Dwyer GRANTING pltfs' motion to shorten time on motion for leave to file overlength reply brief [83-1] [84-1]; GRANTING pltfs' motion for leave to file overlength reply brief [83-1] (cc: counsel, Judge) (md)
6/30/99	87	REPLY memorandum by plaintiff in support of class certification (under seal) [59-1] (md)
6/30/99	88	APPENDIX/working papers filed by plaintiff in support of reply [87-1] (not under seal) (md)
7/2/99	89	MOTION by defendant for leave to file opposition to pltfs' amended motion for class

certification NOTED FOR 7/23/99 (md) [Entry date 07/06/99]

7/2/99 90 MEMORANDUM by defendant in support of motion for leave to file opposition to pltfs' amended motion for class certification [89-1] (md) [Entry date 07/06/99]

7/2/99 -- LODGED ORDER: re: motion for leave to file opposition to pltfs' amended motion for class certification [89-1] (md) [Entry date 07/06/99]

7/2/99 91 MOTION by defendant to shorten time on [91-1] motion for leave to file opposition to pltfs' amended motion for class certification [89-1] NOTED FOR 7/7/99 (md) [Entry date 07/06/99]

7/2/99 92 MEMORANDUM by defendant in support of motion to shorten time on motion for leave to file opposition to pltfs' amended motion for class certification [89-1] [91-1] (md) [Entry date 07/06/99]

7/2/99 -- LODGED ORDER: re: motion to shorten time on motion for leave to file opposition to pltfs' amended motion for class certification [89-1] [91-1] (md) [Entry date 07/06/99]

7/2/99 93 AFFIDAVIT OF SERVICE by defendant of motion for leave to file opposition to pltfs' amended motion for class certification [89-1] et al (md) [Entry date 07/06/99]

7/7/99 94 ORDER by Judge William L. Dwyer GRANTING motion to shorten time on motion for leave to file opposition to pltfs' amended motion for class certification [89-1] [91-1]; RE- NOTED FOR 7/9/99 motion for leave to file opposition to pltfs' amended

motion for class certification [89-1] (C to counsel, Judge) (md) [Entry date 07/08/99]

7/9/99 95 MEMORANDUM by plaintiff in opposition to motion for leave to file opposition to pltfs' amended motion for class certification [89-1] (md) [Entry date 07/12/99]

7/9/99 96 AFFIDAVIT OF SERVICE by plaintiff of memorandum [95-1] (md) [Entry date 07/12/99]

7/14/99 97 MINUTE ORDER: by Judge William L. Dwyer DENYING dfts' motion for leave to file opposition to pltfs' amended motion for class certification [89-1]. Oral argument on the motion for class certification set for 7/29/99 at 9:00 (cc: counsel, Judge) (rs) [Entry date 07/15/99]

7/19/99 98 MINUTE ORDER: by Judge William L. Dwyer renoting the motion to certify class action [59-1] for 7/29/99 (cc: counsel, Judge) (rs) [Entry date 07/21/99]

7/24/99 102 MAIL RETURNED: re: order [86-1] addressed to Alfred Swanson (rs) [Entry date 07/30/99]

7/27/99 99 MINUTE ORDER: by Judge William L. Dwyer rescheduling oral argument on the motion for class certification from 9am to 10am on 7/29/99 (cc: counsel, Judge, ES) (rs) [Entry date 07/28/99]

7/29/99 100 ORDER RESCHEDULING CLASS CERTIFICATION MOTION by Judge William L. Dwyer: pltfs may file suppl brief on 9/9/99 and dfts may file suppl brief on 9/23/99 re motion to certify. The motion to

certify class action [59-1] is renoted for 9/24/99 (cc: counsel, Judge) (rs)

7/29/99 101 TRANSCRIPT FILED of hearing on motion for class certification on 7/29/99 CR: Sue Palmerton (rs) [Entry date 07/30/99]

7/29/99 103 MAIL RETURNED: re: order [94-1] addressed to Alfred Swanson (rs) [Entry date 07/30/99]

7/29/99 104 MINUTES: WLD; Dep Clerk: Eileen; CR: Susan Palmerton; Pla Counsel Steve Berman; Def Counsel Sidney Snyder etal. Oral argument held on 7/29/99 re: additional discovery on motion to certify class. RE-NOTED FOR 9/24/99 motion to certify class action [59-1] (md) [Entry date 08/02/99]

7/30/99 -- MAIL RETURNED: re: Minute Order addressed to Alfred M. Swanson, Jr [97-2] (md) [Entry date 08/02/99]

8/7/99 -- MAIL RETURNED: re: Minute Order [98-1] addressed to Alfred Swanson (md) [Entry date 08/10/99]

8/13/99 -- MAIL RETURNED: re: Minute Order [99-2] addressed to Alfred M. Swanson Jr (md) [Entry date 08/16/99]

8/14/99 -- MAIL RETURNED: re: order [100-1] addressed to Alfred Swanson, Jr (md) [Entry date 08/17/99]

8/23/99 -- LODGED ORDER: stipulation and order for a 10 day extension for pltf to take additional discovery (md) [Entry date 08/24/99]

8/23/99 105 AFFIDAVIT OF SERVICE by plaintiff of order lodged [0-0] (md) [Entry date 08/24/99]

8/24/99 106 STIPULATION and ORDER by Judge William L. Dwyer : RE- NOTED FOR 10/5/99 motion to certify class action [59-1] Pltf will file their supplemental brief on 9/20/99 and defts will file their supplemental brief on 10/5/99 (cc: counsel, Judge) (md) [Entry date 08/25/99]

9/7/99 -- MAIL RETURNED: re: stipulation [106-1] addressed to Michael Rosenfeld (md) [Entry date 09/08/99]

9/7/99 -- MAIL RETURNED: re: stipulation [106-1] addressed to Alfred M. Swanson (md) [Entry date 09/08/99]

9/20/99 107 SUPPLEMENT MEMORANDUM by In re, plaintiffs re motion to certify class action [59-1] (under seal) (md) [Entry date 09/21/99]

9/20/99 108 DECLARATION (supplemental) of Jeniphr Breckenridge re: supplemental memorandum [107-1] (under seal) (md) [Entry date 09/21/99]

9/20/99 -- LODGED ORDER: re: proposed second amended order granting pltfs' motion to certify class [107-1] (md) [Entry date 09/21/99]

9/20/99 109 AFFIDAVIT OF SERVICE by In re, plaintiff of supplemental [107-1] (md) [Entry date 09/21/99]

9/21/99 110 PRAECIPE: by plaintiff re: exhibits to be attached to re: declaration of Jeniphr Breckenridge [108-1] (md) [Entry date 09/22/99]

9/21/99 111 AFFIDAVIT OF SERVICE by plaintiff of praecipe [110-1] (md) [Entry date 09/22/99]

10/4/99 -- LODGED ORDER: stipulation and order to file response to pltfs' supplemental memo in suport of class certification. (md) [Entry date 10/05/99]

10/5/99 112 STIPULATION and ORDER by Judge William L. Dwyer for a 3 day extension for submission of defts' response to pltfs' supplemental memorandum in support of class certification. : (cc: counsel, Judge) (md)

10/7/99 113 MEMORANDUM (supplemental) by defendant in opposition to motion to certify class action [59-1](w/attachments) (md) [Entry date 10/08/99]

10/7/99 114 AFFIDAVIT OF SERVICE by defendant of memorandum [113-1] (md) [Entry date 10/08/99]

10/14/99 115 ORDER TO SHOW CAUSE: by Judge William L. Dwyer deadline set for 10/21/99 for parties to show cause in writing why the following cases should not be dismissed for lack of jurisdiction or remanded to state court: C98-817WD; C98-152WD; C97-1293WD; C98-226WD; C98-151WD and C98-153WD (cc: counsel, Judge) (rs)

10/21/99 116 MAIL RETURNED: re: stipulation [112-1] addressed to James Rennerty (md) [Entry date 10/22/99]

10/21/99 117 RESPONSE by plaintiff re: calendar motion order to show cause [0-0] (md) [Entry date 10/22/99]

10/21/99 118 AFFIDAVIT OF SERVICE by plaintiff of response [117-1] (md) [Entry date 10/22/99]

10/21/99 119 MEMORANDUM by defendant Ford Motor Company re calendar motion order to show cause [0-0] (md) [Entry date 10/22/99]

10/21/99 120 AFFIDAVIT OF SERVICE by defendant Ford Motor Company of memorandum [119-1] (md) [Entry date 10/22/99]

10/23/99 121 MAIL RETURNED: re: stipulation [112-1] addressed to Michael Rosenfeld (md) [Entry date 10/26/99]

10/26/99 122 MAIL RETURNED: re: stipulation [112-1] addressed to Alfred M. Swanson, Jr (md) [Entry date 10/27/99]

10/29/99 123 ORDER by Judge William L. Dwyer of dismissal and remand to State Court as to civil cases C98-817WD; C98-152WD; C97-1293WD; C98-226WD; C98-151WD; C98-153WD. The Court therefore lacks subject matter jurisdiction over the consolidated complaint and the six removed cased. (cc: counsel, Judge) (md) [Entry date 11/01/99]

11/4/99 124 NOTICE OF APPEAL (99-36115) by In re Ford Motor Company from Dist. Court decision [123-1] (cc: CCA, WLD, counsel) (lb) [Entry date 11/09/99] [Edit date 12/06/99]

11/4/99 -- APPEAL FEE RECEIVED: Appellant Ford Motor Company paid fee in amount of $ 105.00 (Receipt 263033) (lb) [Entry date 11/09/99]

11/4/99 125 CERTIFICATE of SERVICE by Ford Motor Company of Notice of Appeal; Representation Statement; Civil Appeals Docketing Statement and Certificate of Service. (lb) [Entry date 11/09/99]

11/9/99 -- APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (lb)

11/9/99 -- ENT-Civil Appeals Docketing Statement forwarded to Mediator's Office in Seattle. (lb)

11/9/99 -- ENT-Representation Statement forwarded to 9th CCA. (lb)

11/22/99 126 MAIL RETURNED: re:. order [123-1] addressed to Alfred M. Swanson Jr (md) [Entry date 11/29/99]

11/24/99 127 NOTICE OF APPEAL (99-36206) by defendant Citibank from Dist. Court decision [123-1] (cc: CCA, WLD, counsel) (lb) [Entry date 12/05/99] [Edit date 12/16/99]

11/24/99 -- APPEAL FEE RECEIVED: Appellant Citibank paid fee in amount of $ 105.00 (Receipt 263442) (lb) [Entry date 12/05/99]

11/24/99 -- NOTIFICATION by Circuit Court of Appellate Docket Number 99-36115 (Ford) (lb) [Entry date 12/06/99]

11/29/99 -- ENT-Representation Statement from Citibank forwarded to 9th CCA. (lb) [Entry date 12/08/99]

11/29/99 128 TRANSCRIPT DESIGNATION and Ordering Form for dates: None. (lb) [Entry date 12/08/99]

12/5/99 -- APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (lb)

12/15/99 -- NOTIFICATION by Circuit Court of Appellate Docket Number 99-36206 (Citibank) (lb) [Entry date 12/16/99]

12/20/99 129 MAIL RETURNED: re: appeal [127-1] addressed to Alfred Swanson. (lb)

12/27/99 130 ORDER (CCA 99-36115) A review of the record suggests that this court may lack jurisdiction over the appeal because an order remanding an action to state pursuant to 28 USC 1447(c) due to lack of subject matter jurisdiction is not reviewable under 28 USC 1291. Withinn 14 days after entry of this order, appellant shall move for voluntary dismissal of the appeal or show cause why is should not be dismissed for lack of jurisdiction. If appellant elects to show cause, appellee's may respond within 10 days after service of appellant's memorandum. If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to 9th CCA rule 42-1. Briefing is suspended pending further order of the court. (lb) [Entry date 01/04/00]

12/29/99 -- CERTIFICATE OF RECORD Transmitted to USCA, (cc: all counsel) (jk)

1/12/00 131 TRANSCRIPT DESIGNATION and Ordering Form for dates: None [127-1] (lb) [Entry date 01/13/00]

1/12/00 132 CERTIFICATE of SERVICE by defendant Citibank of Transcript Order and Certificate of Service. (lb) [Entry date 01/13/00]

3/21/00 1983 ORDER (CCA 99-36115 & 99-36206) The parties' stipulated motion to consolidate these appeals is granted. Appeals nos. 99-36115 and 99-36206 are consolidated. The court has received and reviewed appellant's identical responses to this court's orders to show cause of 12/21/99 and 1/27/00. The jurisdictional issue does not appeal suitable for summary disposition. Accordingly, the order to show cause are discharged. The

opening brfs are due 4/18/2000; the answering brfs are due 5/18/2000; and the optional reply brfs are due 14 days after service of the answering brfs. The parties shall include brfs on the merits a discussion of the jurisdictional issue. All parties on a side are encouraged to join in a single brf to the greatest extent practicable. (lb) [Entry date 03/27/00]

11/7/01 1984 MANDATE (99-36115, 99-36206) from Circuit Court of Appeals AFFIRMING IN PART and DISMISSING IN PART the decision of the District Court [127-1],[124-1] (cc: all counsel, WLD, jgm book) (sa) [Entry date 11/08/01]

11/20/01 1985 MAIL RETURNED: re: rder appeal [1984-1] addressed to James . Fennerty, ESQ. (sa) [Entry date 11/21/0

11/28/01 1986 MAIL RETURNED: from Alfred M. Swanson, Jr. re: order appeal 984-1] (sa)

12/1/01 1987 MAIL RETURNED: re: order appeal, addressed to Frederick Kuykendall, III. [1984-1] (sa) [Entry date 12/04/01]

APPENDIX B

General Docket for the
US Court of Appeal for the Ninth Circuit

[Caption matter omitted]
[Docket as of March 7, 2002 11:15 pm]

99-36115 McCauley, et al v. Ford Motor Company, et al

11/22/99 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 11/15/99; appellee's designation of RT is due 11/24/99; appellant shall order transcript by 12/6/99; court reporter shall file transcript in DC by 1/4/00; certificate of record shall be filed by 1/11/00 ; appellant's opening brief is due 2/22/00; appellees' brief is due 3/21/00; appellants' reply brief is due w/in 14 days of svc of aple's brief. [99-36115] (jmk) [99-36115]

11/22/99 Filed attorney for Appellant Civil Appeals Docketing Statement served on 11/4/99 (to CONFATT) [99-36115] [99-36115] (jmk) [99-36115]

11/22/99 Filed notice of Representation of Steve Berman, John Alexander, Michael Rosenfeld, Roger Kirby, James Lewis, Michael Williams, Russell Drake for Aples. John Beisner, Brian Anderson, Brian Brooks, Sidney Snyder for Aplt Ford Motor Company. Christopher Lipsett, Bruce Berman, Natacha Steimer, Thomas Boeder for Aplt Citibank. [99-36115] (jmk) [99-36115]

11/30/99 Case rejected from Circuit Mediation Program. (sa) [99-35942 99-35943 99-36087 99-36095 99-36115]

12/1/99 Received Appellant Ford Motor Company's notice of non- designation of reporter's transcript. [99-36115] (cha) [99-36115]

12/21/99 Filed order MOATT (MF) A review of the record suggests that this court may lack jurisdiction over the appeal because an order remanding an action to state court pursuant to 28 U.S.C. 1447(c) due to lack of subject matter jurisdiction is not reviewable under 28 U.S.C. 1291. See 28 U.S.C. 1447(d); Krangel v. General Dynamics Corp., 968 F.2d 914, 915-16 (9th Cir. 1992)(per curiam). Within 14 days afater entry of this order, appellant shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, appellees may respond within 10 days after service of appellant's memorandum. If appellant does not comply with this order, the clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1. Briefing is suspended pending further order of the court. [99-36115] (sm) [99-36115]

1/4/00 Filed Aplt Ford Motor Company's response to order to show cause; served on 1/3/00 (Moatt) [99-36115] (gva) [99-36115]

2/14/00 Filed Stipulated mtn by Aplt Citibank (S.D.), NA & aplt Ford Motor Company to consolidate cases 99-36115 & 99-36206 [99-36206, 99-36115] served on 2/11/00 [Response to MOATT OSC pening per PROMO) (Copies already sent via promo) [99-36206, 99-36115] (mhf) [99-36115 99-36206]

3/13/00 Filed order (Appellate Commissioner) The parties' stipulated motion to consolidate these appeals is GRANTED. Appeal nos. 99-36115 and 99-36206 are consolidated. The court has received and reviewed appellants' identical responses to this court's order to show cause of 12/21/99 and 01/27/00. The jurisdictional issue does not appear suitable for summary disposition. Accordingly, the orders to show cause are discharged. The following briefing schedule shall govern these consolidated appeals; the opening briefs are due 04/18/00; the answering briefs are due 05/18/00; and the optional reply briefs are due 14 days after service of the answering briefs. The parties shall include in the briefs on the merits a discussion of the jurisdictional issue. See National Indus. v. Republic Nat'l Life INs. Co., 677 F.2d 1258, 1262 (9th Cir. 1982).All parties on a side are encouraged to join in a single brief to the greatest extent practicable. See 9th Cir. R. 28-4. [3850164-1] in 99-36115, 99-36206 (MOATT) [99-36115, 99-36206] (sm) [99-36115 99-36206]

4/18/00 Received Appellant Ford Motor Company in 99-36115 and Appellant Citibank (S.D.), NA in 99-36206's formal brief in 33, 5 copies and 5 Excerpts of Record in 1 volume: deficient - only 5 copies submitted: notified counsel. Served on (cha) [99-36115 99-36206]

4/26/00 Received joint appellant's additional 10 briefs to satisfy (major) brief deficiency, served on 4/17/00 [99-36115, 99-36206] (cha) [99-36115 99-36206]

4/26/00 Filed original and 15 copies of joint appellant's formal opening brief in 34 pages and five excerpts of record in 1 volumes; served on 4/17/00 [99-36115, 99-36206] (cha) [99-36115 99-36206]

5/12/00 Rec'd notice of change of address from Jeffrey S. Love for Ford Motor Company in 99-36206 dated 5/10/00. (New address is: KLARQUIST, SPARKMAN, CAMPBELL, LEIGH & WHINSTON, One World Trade Ctr, 121 SW Salmon St, Ste 1600, Portland, OR 97204-2988, 503/226-7391 [99-36206, 99-36115] (mhf) [99-36115 99-36206]

5/18/00 Received orig. and 15 copies of Plaintiff-Appellees brief of 12 pages; 5 excerpts of record in 1 volume; deficient: No Certificate of Service; notified counsel [99-36115, 99-36206] (cha) [99-36115 99-36206]

5/26/00 Received Appellees Certificate of Service to satisfy (major) brief deficiency, served on 5/17/00. [99-36115, 99-36206] (cha) [99-36115 99-36206]

5/26/00 Filed original and 15 copies of appellees 12 page brief, 5 Exc. in 1 vol; served on 5/17/00 [99-36115, 99-36206] (cha) [99-36115 99-36206]

6/1/00 Filed original and 15 copies Ford Motor Company and Citibank (S.D.), NA's reply brief, (Informal: NO) 17 pages; served on 6/1/00 [99-36115, 99-36206] (sm) [99-36115 99-36206]

3/30/01 Calendar check performed [99-36115, 99-36206] (th) [99-36115 99-36206]

4/13/01 Calendar materials being prepared. [99-36115, 99-36206] [99-36115, 99-36206] (th) [99-36115 99-36206]

4/17/01 Filed order (Deputy Clerk: JF) These cases are being placed before the same panel for disposition because they may involve similar issues regarding the amount in controversy under diversity jurisdiction. The case are not consolidated for oral

argument. Counsel may wish to confer in order to enhance oral argument. The clerk shall serve a copy of the court's service list for each case on all parties. [99-36115, 99-36206, 00-35328] (gar) [00-35328 99-36115 99-36206]

4/19/01 CALENDARED: Seattle June 8 2001 9:00 a.m. Courtroom at Park Place, 21st Floor [99-36115, 99-36206] (th) [99-36115 99-36206]

5/8/01 Received Roger W. Kirby for Appellee Ricky A Copeland, Lynette M Hornreich, Howard S Hornreich, John LaGrou, Jeffrey Scott Merrick, Thomas Walters, Gerald Essig, John B McCauley letter dated 4/24/01 re: does not represent any party in these cases. [99-36115, 99-36206] (gar) [99-36115 99-36206]

6/8/01 ARGUED AND SUBMITTED TO James R. BROWNING, J. C. WALLACE, Thomas G. NELSON [99-36115, 99-36206] (ss) [99-36115 99-36206]

8/9/01 FILED CERTIFIED RECORD ON APPEAL IN 1 VOLS.(TOTAL): 1 CLERKS REC None RTs (Original) [99-36115] (kym) [99-36115]

9/6/01 FILED OPINION: AFFIRMED IN PART AND DISMISSED IN PART (Terminated on the Merits after Oral Hearing; Affirmed in Part and Dismissed in Part; Written, Signed, Published: James R. BROWNING; J. C. WALLACE, author; Thomas G. NELSON.) FILED AND ENTERED JUDGMENT. [99-36115, 99-36206] (gar) [99-36115 99-36206]

9/18/01 Filed Appellant Ford Motor Company, Appellant Citibank (S.D.), NA's unopposed motion to extend time to file petition for rehearing for another 7 days, [99-36115, 99-36206] served on

9/18/01. PANEL [4256286] [99-36115, 99-36206] (gar) [99-36115 99-36206]

9/25/01 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): granting appellant's unopposed motion to extend time to file a petition for rehearing [4256286-1] petition for rehearing due 9/27/01. [99-36115, 99-36206] (gar) [99-36115 99-36206]

9/27/01 [4263353] Filed original and 50 copies Appellant Ford Motor Company in 99-36115, Appellant Citibank (S.D.), NA in 99-36206 petition for rehearing with suggestion for rehearing en banc 13 p.pages, served on 9/27/01. PANEL AND ALL ACTIVE JUDGES [99-36115, 99-36206] (gar) [99-36115 99-36206]

10/9/01 Rec'd notice of change of address from Russell Jackson Drake for Appellee John B McCauley, Appellee Gerald Essig, Appellee Thomas Walters, Appellee Jeffrey Scott Merrick, Appellee John LaGrou, Appellee Howard S Hornreich, Appellee Lynette M Hornreich, Appellee Ricky A Copeland in 99-36115, Russell Jackson Drake for Appellee Ricky A Copeland in 99-36206 dated 10/3/01. [99-36115, 99-36206] (rc) [99-36115 99-36206]

10/22/01 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): denying petition for rehearing and petition for for enbanc rehearing [4263353-1] [99-36115, 99-36206] (gar) [99-36115 99-36206]

10/30/01 MANDATE ISSUED [99-36115, 99-36206] (gar) [99-36115 99-36206]

10/30/01 Filed Appellant Ford Motor Company and Citibank (S.D.), NA's motion to recall the

mandate. [99-36115, 99-36206] served on 10/30/01 PANEL [4287598] [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/13/01 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): granting appellant's motion to recall mandate [4287598-1] Ford Motor Co. and Citibank may respond by letter-brief of no more than 5 pages, within 7 days of the date of this order, as to why it is necessary for this ct to withhold its mandate. [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/19/01 Filed original and 15 copies Appellant Ford Motor Company in 99-36115, Appellant Citibank (S.D.), NA in 99-36206 supplemental letter brief of 4 pages, served on 12/19/01. PANEL [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/26/01 Received Jeffrey S. Love for Ford Motor Company in 99-36206 letter dated 12/19/01 re: requesting removal from serice lists. [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/27/01 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 01-896 filed on 12/19/01. [99-36115, 99-36206] (gar) [99-36115 99-36206]

1/18/02 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): Aplt's mtn for stay of mandate is GRANTED pending the Supreme Court's decision. Aplts are hereby requested to keep the crt apprised of any changes &/or status in this case [99-36115, 99-36206] (mhf) [99-36115 99-36206]

2/25/02 Received notice from Supreme Court, petition for certiorari GRANTED on 2/19/02 . Supreme

Court No. 01-896 PANEL (gar) [99-36115 99-36206]

2/26/02 Received Bruce M Berman for Appellant Citibank (S.D.), NA letter dated 2/25/02 re: requesting continued stay of mandate pending Supr Ct decision in case. PANEL [99-36115, 99-36206] (gar) [99-36115 99-36206]

3/7/02 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): Pursuant to the Supreme Ct granting aplts' cert pet in this matter, the stay of mandate is hereby ext pending the Supreme Ct's final decision. Aplts are hereby requested to keep the ct apprised of any changes and/or status in this case. [99-36115, 99-36206] (gar) [99-36115 99-36206]

[Docket as of March 7, 2002 11:15 pm]

APPENDIX C

DOCKET NO. 1199 [FILED: Jan. 8, 1998]

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE FORD MOTOR COMPANY/CITIBANK N.A.
CARDHOLDER REBATE PROGRAM LITIGATION

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR.,WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS AND LOUIS C. BECHTLE, JUDGES OF THE PANEL

TRANSFER ORDER

This litigation presently consists of four actions in the following federal districts: one action each in the Northern District of Illinois, Eastern District of New York, District of Oregon and Western District of Washington. Defendants in all actions, Ford Motor Company (Ford) and Citibank N.A. (Citibank), move to centralize, pursuant to 28 U.S.C. §1407, the four actions[1] for coordinated or consolidated pretrial proceedings. Plaintiffs in the Washington, New York and Illinois actions agree that centralization is appropriate; these parties and defendants agree that the Western District of Washington, where the first filed action is pending, is the appropriate transferee court for this litigation. The Oregon plaintiff opposes the motion on the ground that a motion to remand his action to Oregon state court is pending.

---

[1] The Panel has been notified that a potentially related action has been recently removed from Alabama state court to the federal court in the Northern District of Alabama. This action and any other related actions will be treated as potential tag-along actions. *See* Rules 12 and 13, R.P.J.P.M.L., 147 F.R.D. 589, 596-97 (1993).

On the basis of the papers filed and the hearing held, the Panel finds that the actions in this litigation involve common questions of fact concerning allegations that one or both defendants misrepresented or withheld information about the nature, extent and implementation of the Ford/Citibank cardholder rebate program and defendants' decision to discontinue this program. Centralization under Section 1407 in the Western District of Washington will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation, while accordingly being desirable in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary. We note that the Oregon plaintiffs remand motion can be presented to and decided by the transferee judge. *See, e.g., In re Ivy*, 901 F.2d 7 (2d Cir. 1990); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 368 F. Supp. 812, 813 (J.P.M.L. 1973).

We are persuaded that the Western District of Washington is the most appropriate transferee forum for this litigation. We note that i) a related action is pending there, and ii) most of the parties favor centralization in this court.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A and pending outside the Western District of Washington be, and the same hereby are, transferred to the Western District of Washington and, with the consent of that court, assigned to the Honorable William L. Dwyer for coordinated or consolidated pretrial proceedings with the action pending there.

FOR THE PANEL:

/s/ John F. Nagle
John F. Nangle
Chairman

SCHEDULE A

MDL-1199 -- In re Ford Motor Company/Citibank N. A. Cardholder Rebate Program Litigation

Northern District of Illinois

John McCauley v. Ford Motor Co., et al., C.A. No. 1:97-5627

Eastern District of New York

Gerald Essig, et al. v. Ford Motor Co., C.A. No. 1:97-4648

District of Oregon

Jeffrey Scott Merrick v. Ford Motor Co., et al., C.A. No. 3:97-1186

Western District of Washington

Howard S. Hornreich, et al. v. Ford Motor Co., et al., C.A. No. 2:97-1293

APPENDIX D

THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT DEPUTY
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK
(SOUTH DAKOTA), N.A. CARDHOLDER
REBATE PROGRAM LITIGATION

MDL Docket No. 1199 [FILED Jul. 22, 1998]
THIS DOCUMENT RELATES TO ALL CASES

CASE MANAGEMENT ORDER

I. PRETRIAL CONSOLIDATION AND COORDINATION

A. Consolidated Cases

By order of the Judicial Panel on Multidistrict Litigation ("MDL Panel"), the cases listed below have been consolidated for pretrial purposes:

- *Hornreich, et al. v. Ford Motor Co. and Citibank (South Dakota) N.A.*, C97-1293WD, originally removed to the United States District Court for the Western District of Washington at Seattle;
- *McCauley v. Ford Motor Co. and Citibank (South Dakota) N.A.*, C98-151 WD, originally removed to the United States District Court for the Northern District of Illinois;

- *Essig, et al. v. Ford Motor Company*, C98-152WD, originally removed to the United States District Court for the Eastern District of New York;
- *Merrick v. Ford Motor Co. and Citibank (South Dakota) N.A.*, C98-153 WD, originally removed to the United States District Court for the District of Oregon;
- *LaGrou v. Ford Motor Co.*, C98-226WD, originally removed to the United States District Court for the Central District of California;
- *Copeland v. Ford Motor Co.,* Alabama Case No. CV-97-PWG-266-2, C98-817WD, originally removed to the United States District Court for the Northern District of Alabama.

B. Applicability of Order

The terms of this Order shall apply automatically to the six actions listed above and to all other putative class actions concerning the subject matter of the six actions later instituted in, removed to, or transferred to this Court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407).

C. Objections to Order

Objections to the terms of this Order must be filed by parties or their counsel within twenty (20) days of receipt of the Order (from any source).

D. Dissemination of Order

Plaintiffs' Lead Counsel shall immediately send (by overnight delivery) a copy of this Order to counsel in all actions to which this Order applies. Upon subsequently learning that this Order is or may be applicable to any other action, Plaintiffs' Lead Counsel shall immediately send (by overnight delivery) a copy of this Order to counsel in that action.

II. CASE IDENTIFICATION

The purpose of the following instructions is to reduce the time and expense of duplicate filings of documents through the use of a master case, while at the same time not congesting the master case with miscellaneous pleadings and orders that are of interest only to the parties directly affected by them.

A. Master Docket and Record

For the convenience of the parties and the Court, the Clerk of this Court will maintain a master docket with a single docket number and master record under the style "*In Re Ford Motor Company/Citibank (South Dakota), N.A. Cardholder Rebate Program Litigation*", Master Case No. MDL-1199. When an order, pleading or other document is filed and docketed in the master case, it shall be deemed filed and docketed in each individual case to the extent applicable and will not ordinarily be separately docketed or physically filed in any individual cases. However, the caption may also contain a notation indicating whether the document relates to all cases or only to specified cases, as described below.

B. Captions

All orders, pleadings, motions, and other documents shall bear the following caption:

[Caption omiited]

C. Master Filing

If the document(s) is generally applicable to all consolidated actions, the caption shall include the notation that it relates to "ALL CASES," and the Clerk will file and docket the document(s) only in the master record.

D. Separate Filing

If a document is intended to apply only to a particular case or cases, the caption shall indicate the case number of the case(s) to which it applies, and extra copies shall be

provided to the Clerk to facilitate filing and docketing both in the master record and the specified individual case record.

III. ORGANIZATION OF COUNSEL

A. Plaintiffs' Counsel

1. The firm of Hagens Berman P.S. shall be Plaintiffs' Lead Counsel.

2. In addition to the duties of being the authorized spokespersons for plaintiffs before the Court, Plaintiffs' Lead Counsel shall discharge the duties set forth below:

a. To coordinate and determine in briefs, oral argument or such other fashion as may be appropriate and to present (personally or by designee) to the Court and opposing parties, the position of the plaintiffs on all matters arising during all pretrial and trial proceedings;

b. To coordinate for plaintiffs the initiation and conduct of discovery, pretrial proceedings and trial:

c. To conduct settlement negotiations on behalf of plaintiffs;

d. To direct and coordinate the work of all plaintiffs' counsel and to make assignments of work to be performed in the prosecution of the case in a manner to assure that pretrial preparation is conducted effectively, efficiently and economically;

e. To monitor the activities of plaintiffs' counsel to assure that schedules are met and that unnecessary expenditures of time and expenses are avoided; and

f. To perform such other duties as may be incidental to proper coordination of plaintiffs' pretrial and trial activities or authorized by further order of the court.

3. Plaintiffs' Lead Counsel is hereby designated as the counsel for plaintiffs upon whom all notices, orders, pleadings, motions, discovery and memoranda are to be

served, except for case specific matters, which shall be served on lead counsel and the attorneys of record in that particular case.

4. Defendants' counsel may rely upon all agreements made with lead counsel, and such agreements shall be binding on all plaintiffs.

5. Defendants' stipulation to Pretrial Order No. 1 is not an indication that defendants participated in, agree with or take any position with respect to the allocation of responsibilities concerning plaintiffs and/or plaintiffs' counsel.

B. Plaintiffs' Executive Committee

1. The Plaintiffs' Executive Committee shall consist of the following:

Mr. John H. Alexander
Alexander, Fennerty & Green
168 North Michigan Avenue, Suite 800
Chicago, IL 60601

Mr. Michael J. Rosenfeld
Kalb, Rosenfeld & Essig
283 Commack Road
Commack, NY 11725

Mr. Roger W. Kirby
Kaufman Malchman Kirby & Squire, LLP
919 Third Avenue
New York, NY 10022

James G. Lewis
9911 W. Pico Blvd., Suite 503
Los Angeles, CA 90035

Michael L. Williams
Williams & Troutwine, P.C.

1001 SW 5th Ave., Suite 1900
Portland, OR 97204

2. The Plaintiffs' Executive Committee shall organize itself and agree on a plan for conducting the litigation on behalf of all plaintiffs and to advance all costs necessary. Plaintiffs' Executive Committee may, in concert with Lead Counsel, brief and argue motions, and consult with Plaintiffs' Lead Counsel on matters of common concern and conduct pretrial, trial, and post-trial proceedings in concert with Lead Counsel. Each attorney acting as counsel for any party herein who is a member in good standing of the bar of the Supreme Court of any state or of any United States District Court shall be deemed admitted *pro hac vice* before this Court, without further action, upon payment of the admission fee, in connection with these proceedings.

C. Defendants' Counse

John H. Beisner and Brian C. Anderson of O'Melveny & Myers LLP, Washington, D.C.; and Sidney R. Snyder, Jr. of Merrick, Hofstedt & Lindsey, Seattle, Washington are Defense Counsel for defendant Ford Motor Company, and may be assisted by other Counsel as defendant so determines. Christopher R. Lipsett and Bruce M. Berman of Wilmer, Cutler & Pickering, Washington, D.C. and Thomas L. Boeder of Perkins Coie, Seattle, Washington are Defense Counsel for defendant Citibank (South Dakota), N.A., and may be assisted by other Counsel as defendant so determines.

IV. SERVICE OF DOCUMENTS

A. Orders

The Clerk shall copy each order to Plaintiffs' Lead Counsel and to each Defendant's Counsel for distribution as appropriate to other counsel and parties.

B. Pleadings, Motions, and Other Documents

A party filing a pleading, motion, or other document shall provide (by overnight delivery) one copy each to Plaintiffs' Lead Counsel and to each member of Plaintiffs' Executive Committee and one copy to each Defendant's Counsel for distribution. Pursuant to Fed. R. Civ. P.5, service on Plaintiffs' Lead Counsel shall constitute service on other attorneys and parties for whom Plaintiffs' Lead Counsel is acting and service on each Defendant's Counsel shall constitute service on defendants and their Counsel, such service being deemed effective three (3) days after service on the Plaintiffs' Lead or Defendant's Counsel.

V. COURSE OF PROCEEDINGS

A. Consolidated Complaint

Should plaintiffs in all or some of the consolidated actions decide to file a consolidated complaint with respect to those actions, that complaint shall be filed within fifteen (15) days after this Order becomes effective.

B. Fed. R. Civ. P.12 Motions

Should defendant(s) decide to file a motion to dismiss any or all portions of a consolidated complaint, or a motion for judgment on the pleadings with respect to any existing complaint that has already been answered pursuant to Fed. R. Civ. P. 12, that motion shall be filed within thirty (30) days after the deadline for filing a consolidated complaint. This provision does not preclude the filing of other Rule 12 motions or other dispositive motions at other times, as appropriate. Plaintiffs' response to any Rule 12 motion shall be filed and served thirty (30) days thereafter, and defendant(s)' reply shall be filed and served fifteen (15) days thereafter.

C. Class Certification Matters

1. Exchange Of Initial Core Documents

Provided that all parties to the litigation have entered into a mutually acceptable confidentiality agreement, within

fifteen (15) days after entry of this Order, Defendants will produce to Plaintiffs' Lead Counsel all documents produced to the Federal Trade Commission in connection with its investigation of the termination of the Ford Rebate Program; and Plaintiffs will produce to Defendants' Counsel all core documents in the possession of each named plaintiff relating to their Ford/Citibank credit card and the Ford Rebate Program (*e.g.*, a sample bill containing the named plaintiffs credit card number; all cardholder agreements; documents concerning the Ford Rebate Program). Parties will not be required to respond to any formal discovery requests (*e.g.*, interrogatories, document requests, requests to admit) until thirty (30) days after the Court's final decision(s) on all Rule 12 motions.

2. General Class Certification Discovery

After the Court issues the last of its orders resolving all Rule 12 motions, the parties will have sixty (60) days to complete general discovery designed to create an evidentiary record upon which plaintiffs' class certification motion can be briefed and decided (the "Class Certification Discovery Period").

3. Plaintiffs' Class Certification Motion(s)

Within fifteen (15) days after the conclusion of the Class Certification Discovery Period, plaintiffs shall file any motions to certify proposed classes under Fed. R. Civ. P.23 and a memorandum setting forth their arguments in support of said motion, and the evidentiary basis therefor. At the same time, plaintiffs shall identify all experts and witnesses upon whom they will rely in support of their motion (including the information contemplated by Fed. R. Civ. P. 26(a)(2)(B) as to experts) and file any expert reports or affidavits upon which they rely in support of their class certification motion(s). Plaintiffs shall not rely on any experts in support of class certification that are not identified at this time.

4. Defendants' Class Certification Opposition

If plaintiffs' class certification papers identify no experts or other witnesses in support of class certification, defendants shall file briefing setting forth their arguments in opposition to plaintiffs' motions, and the evidentiary basis therefor, within thirty (30) days after the filing of plaintiffs' class certification motion(s). At the same time, defendants shall identify all experts and witnesses upon whom they will rely in opposing plaintiffs' class certification motion(s) (including the information contemplated in Fed. R. Civ. P. 26(a)(2)(B) as to experts), and file any expert reports or affidavits upon which they rely in opposing plaintiffs' class certification motion(s). Defendants shall not rely on any experts in opposition to class certification that are not identified at this time. If plaintiffs' class certification papers identify new experts and/or other witnesses, then the briefing schedule shall be amended to provide an additional thirty (30) days for taking discovery of such experts/witnesses and for filing an opposition brief.

5. Plaintiffs' Reply Memorandum

If defendants' class certification papers identify no experts or other witnesses in opposition to class certification, plaintiffs may file a reply memorandum in support of their class certification motion(s) within fifteen (15) days after the filing of defendants' opposition briefing. The reply memorandum shall be confined to responding to arguments made in defendants' opposition memorandum. If defendants' class certification papers identify new experts and/or other witnesses, then the briefing schedule shall be amended to provide an additional fifteen (15) days for taking discovery of such experts/witnesses and for filing an opposition brief.

6. Class Certification Hearing

After the filing of all briefing concerning plaintiffs' class certification motion, the Court may, at its discretion, schedule a hearing on any class certification motions.

D. Motions to Strike Class Allegations

Defendants may file a motion to strike any or all class allegations at any time. Such a motion will be heard and considered in due course.

E. Pleadings

Except for good cause shown, no additional named plaintiffs or other parties may be added to existing actions more than fifteen (15) after the effective date of this Order.

F. Further Orders

Following the entry of orders disposing of class certification issues, the Court shall, if necessary, enter a further management order regarding completion of discovery on the merits, summary judgment motions, and trial.

VI. DISCOVERY

A. General Rules

1. Filing Discovery Requests and Responses

Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the Court except when specifically ordered by the Court or to the extent offered in connection with a motion.

2. Attempt to Resolve Disputes

To avoid unnecessary litigation concerning discovery disputes, counsel are directed to meet and confer before filing any motion on discovery issues. In any motion filed, counsel for the moving party must certify that a good faith effort was made to resolve the dispute.

3. Confidentiality

Prior to any discovery being produced to any party (either the exchange of initial core documents described in Section V.C.1 above, or formal discovery described in Section V.C.2 above, counsel for the parties shall agree to

and sign a Confidentiality Order covering said discovery. Such Confidentiality Order shall generally be based on the model provided in the *Manual for Complex Litigation, Third*.

B. Discovery Requests

Counsel shall, to the extent possible, combine their interrogatories, requests for admission and document requests to any party into single sets of interrogatories, requests for admission and document requests (collectively, "discovery requests"). No question shall be asked that has already been answered in response to discovery requests filed by another party unless there is reason to believe that a different answer will be given. Requests made by the defendant of each named plaintiff are not, for purposes of class certification discovery, duplicative requests. The party served with the discovery requests shall answer and/or object in the manner described in the Federal Rules of Civil Procedure and applicable local rules.

SO ORDERED:

Dated: July 21, 1998

/s/ William L. Dwyer
United States District Judge

Presented by

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APPENDIX E

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR CO/CITIBANK N.A.
CARDHOLDER REBATE PROGRAM
LITIGATION

MDL 1199

CONSOLIDATED COMPLAINT

Plaintiffs, by their undersigned attorneys, bring this action on behalf of themselves and all other persons similarly situated on information and belief based on the investigation of counsel, except those allegations that pertain to the plaintiffs or their attorneys (which are alleged on personal knowledge), and hereby allege as follows:

NATURE OF THIS ACTION

1. This is a consolidated class action brought on behalf of a class of all persons who were holders of VISA and MasterCard credit cards issued by defendants Ford Motor Company ("Ford") and Citibank (South Dakota) N.A. ("Citibank") from the time the two companies began issuing a Ford Citibank "co-branded" credit card (the "Card") in February 1993 through December 31, 1997.

2. In order to promote sales of Ford cars and trucks, the Ford Citibank Card promised cardholders in good standing that they could earn up to $700 in rebates over any consecutive 12-months for a maximum rebate of $3,500 over a 5-year period (the "rebate program"). Unlike most credit

card "rebate" offers, the Ford/Citibank card thus offered a discount on new Ford vehicle purchases that was equivalent to cash and thus of indisputable value to plaintiffs and class members.

3. On or about June 30, 1997, one or both of the defendants sent a letter to plaintiffs and millions of other cardholders unilaterally terminating the rebate feature of the program. According to the letter, no rebates will be credited to any cardholder after December 31, 1997. The reason for this unilateral termination -- the program was too successful.

4. The unilateral termination of the rebate program leaves class members with two equally poor choices. They can either give up the rebates they have already earned and forfeit the benefits defendants promised them or they can buy a new Ford vehicle using the small rebates they have already earned, thereby paying thousands more than they had planned.

5. Either way, Ford will reap the benefit of billions of dollars in rebates that will never be redeemed or will never be earned after January 1, 1998. According to one credit card industry research firm, Ford has paid out $500 million in rebates so far to 500,000 cardholders. Its potential liability for current and future redemptions by all six million of its cardholders, however, is in excess of $21 billion.

6. This action seeks to hold Ford and Citibank to their end of the bargain. The complaint alleges causes of action for breach of contract, unjust enrichment, and consumer fraud.

THE PARTIES

7. Plaintiffs Howard and Lynette Hornreich are residents of Kent, Washington who are holders of the Ford Citibank Card.

8. Plaintiff Gerald Essig is a resident of Suffolk County, New York who is a holder of a Ford Citibank Card.

9. Plaintiff Thomas Walters is a resident of Suffolk County, New York who is a holder of a Ford Citibank Card.

10. Plaintiff John B. McCauley is a resident of Cook County, Illinois who is a holder of a Ford Citibank Card.

11. Plaintiff John La Grou is a resident of the State of California who is a holder of a Ford Citibank Card. Pursuant to California Civil Code § 1782, plaintiff provided defendants with notice of his claim under California's Consumers Legal Remedies Act prior to filing suit.

12. Defendant Ford Motor Company is a Delaware corporation with its principal offices in Dearborn, Michigan.

13. Defendant Citibank is a National Association Bank registered to do business in the United States of America by the Federal Reserve Board and Department of Treasury, Comptroller of Currency Division. Citibank is headquartered in Sioux Falls, South Dakota.

JURISDICTION AND VENUE

14. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

15. The action is properly venued in this district pursuant to order of the Judicial Panel on Multidistrict Litigation dated January 8, 1998.

SUBSTANTIVE ALLEGATIONS

16. The Ford Citibank Card was the product of a joint venture between the second largest car manufacturer in the United States -- Ford -- and the largest credit card issuer in the United States -- Citibank.

17. In September 1992, Ford's competitor, General Motors ("GM") introduced the first automotive rebate card. The GM card permitted cardholders to accumulate rebate points toward the purchase of a new General Motors vehicle. The GM card was so successful that, by February 1993, over

4.5 million GM cards had been issued with nearly $2 billion in outstanding account balances.

18. The Ford Citibank Card was a direct response to the success of the GM card. Ford feared that car buyers would be induced to purchase more GM vehicles because of the popularity of the GM card. As David Robertson, President of the Nilson Report, noted: "Ford really had to do this after GM's success."

19. Citibank, too, had a competitive motive. It feared the continuing attrition of its credit card portfolio as its customers switched their credit card balances to the GM card. According to the Nilson Report, 8% of Citibank's cardholders had canceled their accounts the previous year, and the GM card was the fastest growing card on the market.

20. Accordingly, in February 1993, Ford and Citibank began issuing a co-branded Ford Citibank credit card that would permit cardholders to earn rebates similar to those earned with the GM card. Every time a customer used the Ford Citibank Card, he earned a rebate equivalent to 5% of the purchase price. A customer could earn up to $700 in rebates in any 12-month period (representing charges up to $14,000), for a maximum rebate of $3,500 -- the same rebate ceiling as the GM card. The rebate could be applied to the purchase of a new Ford vehicle -- it was as good as cash.

21. To publicize the new Card, defendants sent uniform direct mail solicitations to most of Citibank's 30 million cardholders and all of Ford's 20 million customers.

22. Ford understood -- and promoted -- that the primary benefit of its card offered was savings on Ford cars. Thus, one standard solicitation sent to Ford and Citibank customers included the following:

"A 5% Ford Rebate on Every Purchase"

"How can you save hundreds, even thousands of dollars on the cars and light trucks more people want to drive? Get the Ford Citibank Card."

"Savings on some of America's Best Selling Cars and Trucks"

"So get the Ford Citibank Card and start earning savings toward your next new car."

(Emphasis in original.)

23. To distinguish their card from GM's, defendants promoted the Card as the fastest way to reach the maximum rebate. Ford's multimillion dollar nationwide advertising campaign touted that its card permitted cardholders to reach the maximum "Up to two years faster than any other auto company card." Ford was able to make this claim because, although both cards had rebate ceilings of $3,500, Ford Citibank cardholders could earn up to $700 per year, while GM cardholders could earn only $500 per year. Thus, Ford Citibank cardholders could reach the maximum rebate in only five years, while GM cardholders would take seven years to achieve the same rebate.

24. The difference in how fast Ford Citibank cardholders could achieve the maximum rebate was the key promotional feature of the Card. As James Bailey, Citibank's Executive Vice-President of North American Consumer Banking stated, "The chief selling point is that consumers can amass rebates quickly."

25. At its introduction, defendants announced that the new card would become "the most widely-held auto rebate card in America in a matter of months." As it turned out, the card was enormously successful for Ford and Citibank. At the time Ford terminated the rebate program, over six million consumers held the Card.

26. By informing consumers that they could earn up to $3,500 at a rate of $700 per year, Ford falsely and

misleadingly claimed or implied in its advertising and literature disseminated to cardholders and to the public at large that the rebate program would be available for at least five years and that cardholders would have the opportunity to earn the full $3,500 rebate.

27. Defendants have reaped vast profits from the Card. In addition to the variable credit card interest payments that began at an initial rate of 15.4% *per annum*, defendants collect bank interchange fees every time the Card is used. Moreover, only cardholders in good standing with their accounts are eligible for rebates, so cardholders have an extra incentive to stay current with their payments.

28. After plaintiff and members of the class kept their part of the bargain for years, on or about June 30, 1997, defendants sent a letter to their cardholders announcing the unilateral termination of the rebate program. The letter announced that after December 1, 1997, no further rebates could be earned on purchases using the Card. Rebates already earned would expire five years after the calendar year in which they were earned. Cardholders who wish to close their accounts will receive Ford rebate certificates that expire a mere 45 days after the accounts are closed.

29. In a pamphlet that accompanied the June 30, 1997 letter, Ford claimed that it terminated the rebate program because it had "decided that giving Rebates on credit card purchases is not as effective in marketing cars and trucks in 1997 as it was in 1993 when the program was launched." Ford further claimed that "[t]he decision to discontinue the program will let Ford use the resources that would have been required to continue the program for other marketing initiatives..."

30. Despite these claims, the true reason Ford discontinued the rebate program was that the program was quickly becoming unprofitable due to its success. By 1996, Ford had already provided more than $500 million in rebates

to nearly 500,000 cardholders. Ford's future liability, if all six million cardholders redeemed their rebates, was approximately $21 billion.[1] Indeed, Ford noted that its contingent liability was growing by more than 20% every year. According to Ford's annual report, the contingent liability of those rewards was $2.3 billion in 1994, $3.1 billion in 1995 and $4.1 billion in 1997. The problem with the rebate program was not that it was not effective in selling Ford cars and trucks, but rather that it was too effective such that Ford unilaterally determined that it would not make as much money with the Card as it had expected. Thus, by the time defendants canceled the Card, they potentially faced owing class members over $20 billion.

31. Cardholders were offered two choices by defendants, both of which reward Ford and Citibank for luring millions of consumers to use the Card rather than another credit card they could have used to accumulate cash rebates, frequent flyer miles, or other benefits. Ford and Citibank failed to offer members with accumulated rebates any form of compensation such as cash or merchandise credits.

32. Cardholders who needed to accumulate the maximum rebate of $3,500 in order to afford a new Ford will effectively lose all benefits of the rebate program. Unable to afford a Ford with only the lesser rebates they had earned prior to December 31, 1997, they will have no choice but to allow their rebate credits to expire unused. Ford will thereby wipe potentially billions of dollars of liability off its books.

33. Cardholders who are able to make use of their rebate credits by purchasing a new Ford will pay more for their vehicles than if they were permitted to continue accumulating rebates after December 31, 1997, thereby

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[1] This figure is derived by multiplying the six million outstanding cardholders by $3,500 -- the full rebate amount permitted per cardholder.

increasing Ford's profit on every vehicle sold. Either way, Ford wins and its cardholders lose.

CLASS ACTION ALLEGATIONS

34. This action is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure and meets the requirements of subparts 23(a),(b)(2) and (b)(3). The Class satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions, and is composed of the following persons and entities:

> All persons and entities who were holders of VISA and MasterCard credit cards issued by Ford and Citibank from February, 1993 through December 31, 1997.

35. The members of the Class are so numerous that joinder of all Class members is impracticable. Although the exact number of Class members can be determined only through appropriate discovery, plaintiffs believe that the Class includes nearly six million (6,000,000) members.

36. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and all members of the Class sustained damages as a result of defendants' wrongful conduct as complained of in this action. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action litigation.

37. The class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by the members of the Class may be relatively small, the expense and burden of individual litigation make it virtually impossible for plaintiffs and members of the Class individually to seek redress for the wrongful conduct complained of.

38. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a. Whether defendants distributed a standardized direct mail solicitation to millions of consumers;

b. Whether the rebate program was a material element of the contracts between defendants and members of the class;

c. Whether defendants breached their contracts with members of the class;

d. Whether plaintiffs are entitled to specific performance of the rebate program feature of the contracts;

e. Whether defendants were unjustly enriched by their unilaterally termination of the rebate program;

f. Whether defendants violated the consumer protection statutes of Washington and other states;

g. Whether Class members sustained damages and, if so, what is the proper measure of such damages.

39. The Class is readily definable and the prosecution of this action as a class action will reduce the possibility of repetitious litigation. The names, addresses and rebate account information of class members is maintained by defendants in computerized files. Plaintiffs know of no difficulty that will be encountered in the management of this litigation which would preclude its maintenance as a class action.

FIRST CAUSE, OF ACTION
(Breach of Contract)

40. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

41. Plaintiffs and the members of the Class entered into standardized written agreements with Citibank and Ford whereby Ford expressly agreed to enroll all holders of the Card in the Ford Rebate Program.

42. The Rebate Program was a material part (if not the material part) of the contract between defendants and holders of the Card.

43. Defendants breached their contracts with plaintiffs and Class members by unilaterally terminating the Rebate Program -- the most important feature of the Card.

44. Any language in the contract purporting to give defendants the unilateral right to terminate the Rebate Program in this manner is void as unconscionable and against public policy, and is a breach of defendants' duty of good faith and fair dealing. Moreover, defendants did not adequately disclose its unilateral right to terminate to cardmembers when enrolling them as Ford/Citibank cardmembers. The fact that the Card was vastly successful does not and should not provide defendants with an excuse to avoid their contractual obligations.

45. As a result of defendants' breach of contract and good faith and fair dealing, plaintiffs and the members of the Class have been damaged in an amount to be proved at trial.

46. Plaintiffs and the members of the Class are entitled to specific performance of the contract, and in particular, specific performance of the terms of the contract pertaining to the rebate program.

SECOND CAUSE OF ACTION
(Violation of Consumer Protection Statutes)

47. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

48. Defendants' unilateral termination of the rebate program, after signing millions of cardholders based on the representation that they could earn the maximum rebate of

$3,500 over a period of five years is an unfair and deceptive act. To the extent defendants maintain that they had right to unilaterally terminate cardholder agreements, defendants engaged in a deceptive act because it was not adequately disclosed.

49. All 50 states and the District of Columbia have enacted statutes to protect consumers from unfair, deceptive or fraudulent business practices, unfair competition and false advertising. Most states, including Washington, allow consumers a private right of action under these statutes. The statutes which allow consumers a private right of class action to seek redress are as follows:

Alaska	Alaska Stat. § 45,50-471 *et seq.*
Arizona	Ariz. Rev. Stat. Ann. §§ 44-1521 -- 44-1534
Arkansas	Ark. Stat. Ann. §§ 70-901-70-929
California	Calif. Civ. Code §§ 1770, *et seq.*, Business & Profession Code, §§ 17200 and 17500
Connecticut	Conn. Gen. Stat. Ann. §§ 42-110a - 42-110g
Colorado	Col. Rev. Stat. §§ 6-1-101 - 6-1-114
Delaware	6 Del. Code Ann. §§ 2511-2537
Florida	D.C. Code Ann. §§ 28-3801 - 28-3829
Georgia	Fla. Stat. Ann. §§ 501.201 - 501.213
Hawaii	Ga. Code Ann. §§ 10-1 - 10-370
Idaho	Idaho Code §§ 48-601 - 48-619
Iowa	Iowa Code § 714.16
Illinois	815 ILCS § 505/2
Kansas	Kan. Gen. Stat. Ann. §§ 50-623 - 50-644
Kentucky	Ky. Rev. Stat. Ann. §§ 367-110 - 367-990
Louisiana	La. Rev. Stat. Ann. §§ 13:1401 - 13:1418
Maine	Me. Rev. Stat. Ann. §§ 206-214
Maryland	Md. Code Ann. §§ 13-501

Massachusetts	Mass. Gen. L. Ann. Ch. 93A, §§ 1-11
Minnesota	Minn. Stat. Ann. §§ 325D.09 - 325D.16
Mississippi	Miss. Code Ann. §§ 75-24-1 - 75-24-61
Missouri	Mo. Ann. Stat. §§ 407.010 - 407.701
Montana	Mont. Rev. Code Ann. §§ 30-14-101 - 30.14-224
Nebraska	Neb. Rev. Code §§ 59-1501 - 59-1623
Nevada	Nev. Rev. Stat. §§ 59A-101 - 590A.280
New Jersey	N.J. Stat. Ann. §§ 56:8-1 - 56:8-24
New Mexico	N.M. Stat. Ann. § 57-12-10
New York	N.Y. Gen. Bus. L. §§ 349-350
North Carolina	N.C. Gen. Stat. §§ 75-1 - 75-56
Ohio	Ohio Rev. Code Ann. §§ 1345-09
Oregon	Ore. Rev. Stat. §§ 646.605 - 646.642
Pennsylvania	73 Pa. Stat. § 20.1 *et seq.*
Rhode Island	R.I. Rev. L. Ann. §§ 6-13-1-1 - 6-13-1-11
South Carolina	S.C. Code Ann. §§ 369-5-10 - 39-5-160
South Dakota	S.D. Comp. L. §§ 37-24-1 - 37-24-35
Texas	Tex. Rev. Civ. Stat. §§ 13-11-19
Utah	Utah Code Ann. § 13-11-19
Vermont	Vt. Stat. Ann. §§ 2451-2462
Washington	RCW § 19.86.010, *et seq.*
Wisconsin	Wis. Stat. Ann. § 100.18
Wyoming	Wyo. Stat. Ann. §§ 40-12-101 - 40-12-112

50. The deceptive claims defendants made were contained in uniform direct mail solicitations and nationwide advertisements. These standardized promotional materials promised Class members they could, *e.g.*, continue earning rebates up to $3,500 at the maximum rate of $700 per year. These solicitations and advertisements did not adequately disclose that Ford and Citibank reserved to themselves the unilateral right to terminate the rebate program.

51. Defendants' actions constitute unfair and deceptive practices within the meaning of the consumer protection statutes of the aforementioned states.

52. Plaintiffs and Class members were damaged by defendants' unfair and deceptive acts.

53. By reason of the foregoing, plaintiffs and the Class are entitled to recover compensatory and punitive damages for defendants' violation of consumer protection statutes in an amount to be proved at trial.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

54. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

55. Defendants have profited from the interest charges and intercharge fees they collected as a result of the billions of dollars that Class members, including plaintiffs, charged on their Ford Citibank Cards.

56. Plaintiffs and Class members have foregone using other credit cards that would have earned them cash rebates, frequent flyer miles, and other benefits.

57. Defendants' unilateral termination of the rebate program will result in the expiration of billions of dollars in rebates earned by plaintiffs and Class members.

58. Defendants have been unjustly enriched to the detriment of plaintiffs and Class members by their unilateral termination of the rebate program.

59. By reason of the foregoing, plaintiffs and Class members are entitled to recover from defendants the benefit defendants received from their unilateral termination of the rebate program, as it would be unjust and inequitable to permit defendants to retain this ill-gotten benefit.

WHEREFORE, plaintiffs, on their own behalf and on behalf of the Class, demand judgment as follows:

A. Declaring this action to be a proper class action and designating representative plaintiffs and lead counsel;

B. Awarding compensatory damages to plaintiffs and Class members;

C. Awarding specific performance of the Rebate Program to plaintiffs and Class members;

D. Awarding punitive damages to plaintiffs and Class members;

E. Enjoining defendants from continuing their deceptive practices;

F. Awarding plaintiffs and Class members their costs and expenses incurred in this action, including reasonable attorneys' fees and experts' fees; and,

G. Awarding such other and further relief as this Court may deem just and proper.

DATED: August 5, 1998.

HAGENS BERMAN, P.S.

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APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE
FORD MOTOR COMPANY/CITIBANK
(SOUTH DAKOTA), N.A. CARDHOLDER
REBATE PROGRAM LITIGATION

NO. MDL-1199 [FILED: Oct. 14, 1999]

THIS DOCUMENT RELATES TO ALL CASES

ORDER TO SHOW CAUSE

Six separately filed actions against defendants Ford Motor Company and Citibank (South Dakota), N.A., have been transferred to this court by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings. A consolidated complaint was filed on August 5, 1998, on behalf of plaintiffs and a putative nationwide class. Plaintiffs have pleaded diversity jurisdiction under 28 U.S.C. § 1332(a), which requires that the matter in controversy exceed $75,000. They allege that the defendants misrepresented or withheld information about the nature and duration of the Ford/Citibank cardholder rebate program and then wrongfully discontinued that program. Plaintiffs have moved for class action certification under Fed. R. Civ. P. 23, and that motion is pending.

In the current briefs, no party has mentioned the court's jurisdiction. Subject matter jurisdiction, however,"cannot be stipulated to by the parties. . . and the court sua sponte must satisfy itself that jurisdiction exists." *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1. 8 (9th

Cir. 1974) (citing *California v. LaRue*, 409 U.S. 109 (1972); *Mansfield C. & L.M.R.Co. v. Swan*, 111 U.S. 379, 382 (1884)). Any question in that respect should be resolved before the class certification motion is decided.

In *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) the Supreme Court held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." *See also Goldberg v. CPC-Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir.1982) (rejecting argument that the amount in controversy requirement could be met by attributing attorneys' fees "to the named plaintiffs only . . . [or] to the class as a whole and treated as a common find"); *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977) ("where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief"); *Kanter v. Warner-Lambert Co.*, 52 F. Supp. 2d 1126, 1129-1132 (N.D. Cal. 1999) ("[a]ggregation of punitive damages to meet the jurisdictional minimum is not permitted in this circuit"); *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. 1156, 1162-63 (C.D. Cal. 1993). The parties are therefore ordered to show cause in writing by October 21, 1999, why the consolidated action herein should not be dismissed for lack of jurisdiction, and why *Copeland v. Ford Motor Co.*, No. C98-817WD, *Essig v. Ford Motor Co.* No. C98-152WD, *Hornreich v. Ford Motor Co.*, C97-1293WD, *LaGrou v. Ford Motor,* No. C98-226WD, *McCanley v. Ford Motor Co.*, No. C98-151 WD, and *Merrick v. Ford Motor Co.*, No. C98-153 WD, should not be dismissed for lack of jurisdiction (if initially filed in federal court) or remanded to state court. Each side may file a single brief, not to exceed twelve pages, on that subject.

The clerk is directed to send copies of this order to all counsel of record.

Dated: October 14, 1999.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX G

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITTGATION

MDL Docket No. 1199
THIS DOCUMENT RELATES TO ALL CASES

PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Plaintiffs respond to the Court's October 14, 1999 order to show cause by stating that it was defendants, not plaintiffs, who removed six individual state actions to federal court on the premise that the cases satisfied the jurisdictional requirements of 28 U.S.C. § 1332(a), including the matter in controversy amount of $75,000. Therefore, defendants are the proper parties to show cause why the case should not be dismissed for lack of jurisdiction and why the individual cases should not be remanded to state courts.

II. PROCEDURAL HISTORY OF THE CASE

This case is a consolidation of six separately filed actions against defendants Ford Motor Company and Citibank (South Dakota), N.A. The cases were transferred to this court by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings. A consolidated complaint

was filed on August 5, 1998 on behalf of plaintiffs and a putative nationwide class.

The six original cases were filed in various state courts.[1] Within days of the respective filings, defendants removed each of the cases to federal court. Defendants' stated bases for removal were identical in each jurisdiction: (1) complete diversity between themselves and plaintiffs; and (2) a claim that the relief sought satisfied the $75,000 jurisdictional amount. The latter was based on an aggregation of plaintiffs' damages.

III. DISCUSSION

The *Hornreich* plaintiffs made a strategic decision not to move to remand the case to state court. Challenging defendants' removal of the case to federal court could have resulted in a protracted jurisdictional battle that would drain plaintiffs' time and resources and delay pursuit of the merits of plaintiffs' claims. Further, defendants' aggregation of damages to meet the jurisdictional requirement was at least arguable under the law of some jurisdictions. *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, *reh'g en banc, denied*, 70 F.3d 26 (5th Cir. 1995). However, although not settled in recent years, the law of the Ninth Circuit suggests that aggregation does not provide a basis for jurisdiction. *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365 (9th Cir.)("separate claims must be considered separately and each class member's claim must satisfy the jurisdictional amount"), *cert. denied* 459 U.S. 945 (1982); *Snow v. Ford*

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1 *Hornreich v. Ford Motor Co* was filed in King County Superior Court, Washington State; *McCauley v. Ford Motor Co.* was filed in Cook County Court, Illinois; *Essig v Ford Motor Company* was filed in Suffolk County Court,, New York; *Merrick v. Ford Motor Co.* was filed in Multnomah County, Oregon; *Copeland v. Ford Motor Co.* was filed in the circuit court of Tuscaloosa, Alabama; and *La Grou v. Ford Motor Co.* was filed in Superior Court of the State of California.

Motor Co., 561 F.2d 787, 790 (9th Cir. 1977)("the ban on aggregation [applies] with equal force to the equitable as well as the monetary relief")(citations omitted). Thus, the trend suggests jurisdiction is questionable. Again, rather than fight this issue, plaintiffs consented to removal.

IV. CONCLUSION

Defendants removed the six original cases from the state courts where they were filed. Therefore, defendants are the appropriate parties to address the question of this court's subject matter jurisdiction. Plaintiffs acknowledge that although not settled in recent years, the trend in the Ninth Circuit suggests that jurisdiction is questionable.

DATED: 21 October 1999

HAGENS BERMAN, P.S.

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APPENDIX H

THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

NO. C98-153WD
MDL Docket No. 1199
THIS DOCUMENT RELATES TO ALL CASES

DEFENDANTS' MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE

Defendants Ford Motor Company ("Ford") and Citibank (South Dakota), N.A. ("Citibank" and, collectively, "defendants") respectfully submit this memorandum in response to the Court's Order to Show Cause dated October 14, 1999 ("Order").

I. INTRODUCTION

Defendants agree with the Court that subject matter jurisdiction "cannot be stipulated to by the parties" (Order at 1 (citing *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 8 (9th Cir. 1974)). The jurisdictional analysis in a case premised on diversity jurisdiction (such as this case), however, differs significantly from the analysis in cases premised on federal question jurisdiction (such as *Rincon*). In a federal-question case, the existence of subject matter jurisdiction is a question of law to be resolved according to the well-pleaded complaint rule. *See Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir. 1998). In a diversity

case, however, jurisdiction is an ***evidentiary*** issue. Courts look to a wide variety of evidence to determine whether the jurisdictional amount requirement of 28 U.S.C. § 1332 is met, including the fact that the plaintiff himself pleads the existence of federal jurisdiction; the projected cost to the defendant of complying with any requested injunctive relief; and any request the plaintiff has made for punitive damages, among other things. If a "preponderance of [the] evidence" supports a finding that the plaintiff has put in controversy an amount exceeding $75,000 in a case between citizens of different states,[1] federal diversity jurisdiction exists. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997).

As long as the "preponderance of the evidence" standard is met, both the Supreme Court and the Ninth Circuit have repeatedly made clear that litigants have an unmitigated ***right*** to litigate in federal court a case that satisfies the statutory requirements for federal subject matter jurisdiction. *See, e.g., Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943) (diversity jurisdiction "was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, ***at their option***, to assert their rights in the federal rather than in the state courts.") (emphasis added); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 824 (9th Cir. 1963) ("It has long been recognized that when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."). As explained below, the evidence overwhelmingly shows that

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1 The Court's Order does not appear to question the complete diversity of citizenship between the parties. As the pleadings make clear, plaintiffs are citizens of Alabama, New York, Washington, California, Illinois, and Oregon; defendants are deemed citizens of Delaware and Michigan (Ford), and South Dakota (Citibank).

the jurisdictional requirements of 28 U.S.C. § 1332 are satisfied in this case.[2]

II. DISCUSSION

The pleadings and other record materials are replete with evidence showing that diversity jurisdiction exists in this case. The plaintiffs themselves have pleaded the existence of federal jurisdiction. (See Compl. ¶ 14.) The Ninth Circuit has held that plaintiffs' jurisdictional admissions are to be accorded great weight in the jurisdictional analysis. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997) (finding jurisdictional amount requirement satisfied because of plaintiff's "formal judicial admission that the amount in controversy exceeds $50,000"). Other courts have reached the same conclusion. For example, in *Miller v. American Home Prods. Corp.*, No. 95-3567, 1996 U.S. Dist. LEXIS 2413 (E.D. La. Feb. 28, 1996) (attached at Tab 1), the court gave controlling weight to the fact that the plaintiff had filed a state-court complaint that included a jury demand. Under state rules, a jury demand could only be made if the amount in controversy exceeded $50,000. Upon removal to federal court by the defendant, the plaintiffs attempted to deny the existence of jurisdiction by submitting an affidavit stating that they did not seek more than $50,000. The court rejected plaintiffs' motion to remand the case to state court, noting that "[i]t is undisputed that plaintiffs made a jury

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2 This action originated when the Judicial Panel on Multidistrict Litigation transferred six separate actions to this Court for consolidated pretrial proceedings. Rather than proceed under the six separate complaints that existed at the time, counsel for plaintiffs in all six actions submitted a single Consolidated Complaint ("Compl.") on behalf of all plaintiffs. As the single operative complaint in these consolidated actions, the Consolidated Complaint supersedes the original six complaints as the touchstone both of plaintiffs' substantive claims and of this Court's jurisdictional analysis. *Cf. Mann v. City of Tucson*, 782 F.2d 790, 794 (9th Cir. 1986) (diversity jurisdiction is assessed by reference to the allegations contained in the operative complaint).

demand in their state court petition. Therefore, plaintiffs' petition reveals on its face that at least one of plaintiffs' claims exceeds the jurisdictional minimum of $50,000." *Id.* at *3 (citation omitted). As in *Singer* and *Miller*, the fact that plaintiffs themselves formally admit the existence of jurisdiction in their complaint powerfully shows that they have placed in controversy an amount exceeding the jurisdictional minimum.

A. THE VALUE OF THE RELIEF SOUGHT BY THE PUTATIVE CLASS TO VINDICATE THEIR "COMMON AND UNDIVIDED INTERESTS" EXCEEDS THE MINIMUM JURISDICTIONAL AMOUNT

1. Because Plaintiffs Have A Common And Undivided Interest In The "Specific Performance" Requested By The Consolidated Complaint, The Amount-In-Controversy Requirement Is Satisfied Based On The Cost Of Complying With A "Specific Performance" Injunction.

Both the Consolidated Complaint and the testimony of various named plaintiffs make clear that the primary relief sought in this case is specific performance -- namely, an order requiring defendants to permit cardholders "to accrue rebates into the indefinite future." (Deposition of Gerald Essig at 143 (attached at Tab 2); *see also* Compl., Prayer for Relief ¶ C (requesting order "[a]warding specific performance of the Rebate Program to plaintiffs and Class members").) The Supreme Court of the United States has long held that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). The value of the object of the litigation can be considered from either the plaintiff's or the defendant's viewpoint. *See Smith v. Adams*, 130 U.S. 167, 175 (1889) ("the pecuniary value of the matter in dispute may be

determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment"); *see also Tatum v. Laird*, 444 F.2d 947, 951 n.6 (D.C. Cir. 1971) (noting Supreme Court's adherence in *Flast v. Cohen*, 392 U.S. 83 (1968), to this "either viewpoint" rule), *rev'd on other grounds*, 408 U. S. 1 (1972).

The Ninth Circuit has faithfully followed this precedent, holding that in an action seeking equitable relief, courts determine the amount in controversy by reference to the "value of the 'thing sought to be accomplished by the action'" which "may relate to either or any party to the action." *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (quoting *Smith*, 130 U.S. 175)); *see also Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 n.6 (9th Cir. 1996).

This Court's Order cites a number of cases addressing the subject of whether various categories of damages may be aggregated for purposes of satisfying the jurisdictional amount requirement. (*See* Order at 2.) The Ninth Circuit cases cited above set out a general rule that has nothing to do with aggregation: when a defendant will incur substantial costs in order to comply with a request for injunctive relief, that is the proper measure of the "value of the object of the litigation." There is nothing on the face of this rule that would exempt class actions. Admittedly, the Supreme Court's holding in *Snyder v. Harris*, 394 U.S. 332 (1969) -- that discrete individual claims of putative class members cannot be aggregated in determining the jurisdictional amount -- has raised questions about the extent to which this general rule applies in the context of putative class actions. Some federal courts have continued to apply the "either viewpoint" rule despite *Snyder*. *See, e.g., Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *Jacobson*

v. Ford Motor Co., No. 98 C 742 (slip op. at 5-7) (N.D. Ill. Sept. 30, 1999) (attached at Tab 3); *see also Justice v. Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503 (10th Cir. 1991) (holding in multi-plaintiff case that it is proper to value injunction from defendant's viewpoint, and specifically noting that *Snyder* non-aggregation rule does not alter result). Other courts have suggested that, in some circumstances, valuing the costs of injunctive relief by considering the total detriment to a defendant is equivalent to an impermissible aggregation of class-based claims. *See, e.g., Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993).

The Court need not resolve this debate to find that federal jurisdiction exists in this case. *Snyder v. Harris* prevents only the aggregation of ***separate and distinct*** claims. Where, as here, the injunction sought does not involve the separate and distinct claims of any individual, but rather seeks to promote the common and undivided interest of the putative class, *Snyder* is not implicated, and *Ridder*, which adopts the defendant's-viewpoint rule, is the controlling precedent. *Cf. Snow v. Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977) (holding that defendant's viewpoint rule could not be used in case where requested injunction requiring defendant to include $11 wiring kit with all future sales could be allocated among individual plaintiffs and therefore was merely a method of enforcing numerous separate and distinct claims).

This distinction was recently given dispositive effect in *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250 (N.D. Ill. 1996). There, two consumers filed a purported class action alleging that the manufacturer and distributors of a watch had failed to disclose the radioactive contents of their product. The plaintiffs sought compensatory damages, an accounting, and an order requiring the defendants to inform all class members that the watch caused exposure to and absorption of excessive

radiation. *See id* at 252. The defendants removed the case, and the court then denied plaintiffs' motion to remand.

Citing *Snow*, the *Loizon* court expressly held that the "either viewpoint" test could not be used to avoid the non-aggregation principle of *Snyder*. The court concluded, however, that when the putative class has a common and undivided interest in the injunctive relief, the non-aggregation principle of *Snyder* does not apply. *See id.* at 253. According to the court, a finding that federal jurisdiction exists under such circumstances is entirely consistent with *Snyder*.

The court then determined that "only the class, and not individual class members, could request the injunctive relief" of an accounting and an order requiring the defendants to inform all class members that the watch caused exposure to and absorption of excessive radiation. *Id.* at 254 (citations omitted). Since compliance with the claim for injunctive relief would have required nationwide corrective advertising that would have cost well in excess of $50,000 (then the jurisdictional amount) regardless of the number of plaintiffs, the putative class (as opposed to individual putative class members) had a "common and undivided interest" that exceeded the jurisdictional minimum. Thus, "[h]aving established that plaintiffs have a common and undivided interest in the injunctive relief requested," the court concluded that the jurisdictional amount was satisfied by looking to "the defendant's cost of complying with the requested injunctive relief." *Id.* at 254. *Loizon's* holding, which was expressly predicated on the reasoning of both *Snyder* and *Snow*, should be applied in this case.[3]

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[3] Many other courts similarly have held that the cost of injunctive relief to the defendant is the proper method of valuing the amount in controversy in putative class actions where the relief requested is sought to vindicate a common and undivided right. *See, e.g., Hubbard v. General Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at *3 (S.D.N.Y. May 22, 1996) (attached at Tab 4) (putative class had "a

Under the "either viewpoint" rule, it is clear that this case satisfies the jurisdictional amount requirement. The cost to defendants of reinstating the Ford Rebate Program and permitting putative class members to "accrue rebates into the indefinite future" (or even to accrue rebates for just a few years) would be significantly in excess of $75,000. There are large fixed costs involved in operating a rebate program for millions of cardholders. Citibank estimates that the fixed costs (those that "would not depend on the extent of cardholder usage -- such as costs associated with maintaining the pertinent computer systems and software, maintaining customer service procedures and training") of operating a rebate program would far exceed $75,000 per year. (*See* Affidavit of Sheryl Behar (attached at Tab 6) Indeed, simply maintaining the rebate redemption center -- putting aside the costs of recreating an entire administrative apparatus that was dismantled almost two years ago -- would cost more than $75,000 ***per month*** (*see id.*, ¶ 7), regardless of the number of cardholders involved. Thus, the value of this litigation is clearly many times in excess of the $75,000 jurisdictional amount.

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common and undivided interest" in requested court order requiring corrective disclosures and corrective action with respect to an alleged brake defect); *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) ("equitable relief sought in this case [advertising and recall campaign] would benefit the putative class as a whole and not just any individual plaintiff"); *Gibbs v. E.I. DuPont de Nemours & Co.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995) (federal jurisdiction over a "court-supervised fund which would provide medical monitoring" to putative class); *Cahnmann v. Sprint Corp.*, 961 F. Supp. 1229, 1232 (N.D. Ill. 1997) (recognizing defendant's viewpoint as proper valuation method in earlier case where plaintiffs requested an injunction that would have required the defendant to re-program computers used to calculate escrow payments for thousands of consumers); *Tylka v. Gerber Prods. Co.*, Nos. 96 C 1647-49, 96 C 1964, 1996 WL 341441 at *2 (N.D. Ill. June 18, 1996) (attached at Tab 5) (applying defendant's viewpoint to conclude that federal jurisdiction existed in case where plaintiffs requested injunctive relief requiring national corrective advertising).

These are the types of costs to defendants that courts (including *Snyder* and *Snow*) have recognized as being indivisible because they do not arise from separate and distinct individual claims. This is relief that can only go to a class of plaintiffs ***as a class***, and therefore does not implicate the Ninth Circuit's rule against aggregation of individual claims in class actions. *See Loizon*, 950 F. Supp. at 251-54. Accordingly, the cost to defendants of complying with the injunctive relief requested by plaintiffs -- and shown through the named plaintiffs' testimony to be the primary avenue of relief at issue -- independently satisfies the jurisdictional amount requirement.

2. Plaintiffs' Pleadings Make Clear That Their Request For Monetary Relief Also Seeks To Vindicate A Common And Undivided Interest.

The jurisdictional amount requirement is also satisfied by plaintiffs' request for damages, inasmuch as the pleadings (including plaintiffs' Supplemental Memorandum In Support Of Class Certification ("Pls'. Supp. Mem.")) make clear that those damages are sought to vindicate a common and undivided interest purportedly shared by all class members.[4] In their briefs opposing plaintiffs' motion for class certification, defendants argued that there is no way for the Court to separate those putative class members who have suffered compensable damages (*e.g.*, those cardholders who would have used their Ford rebates to purchase a Ford vehicle if they had been permitted to accrue rebates for five years) from those putative class members with no damages. (*See, e.g.*, Defendants' Supplemental Memorandum In

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[4] Obviously, defendants vigorously contest both the substance of plaintiffs' claims and the theories advanced in support of their motion for class certification. This dispute is irrelevant to the present jurisdictional inquiry, however. Even if it eventually "appears that there will be no occasion for an award of damages, that fact does not deprive this court of jurisdiction." *Harding v. U.S. Figure Skating Assoc.*, 851 F. Supp. 1476, 1481 (D. Or. 1994).

Opposition to Class Certification at 13-15.) Plaintiffs' consistent response has been that they need not identify, much less seek to redress, any individual cardholder's particular legal damages allegedly flowing from the termination of the Ford Citibank Rebate Program. Instead, plaintiffs argue that the mere termination of the Ford Rebate Program, without any further individualized analysis, is a violation of consumer-protection and contract law. Plaintiffs therefore have stated that they seek "an aggregate award" of "class-wide damages" without reference to the damages incurred by any individual cardholder. (Pls'. Supp. Mem. at 12-13.) In short, because the amount of monetary damages requested by plaintiffs is unaffected by the presence or absence of any particular cardholder in this lawsuit, the interest being asserted on behalf of the class is a classic "common and undivided" interest.[5]

It is apparent from plaintiffs' complaint that the dollar amount in which plaintiffs assert an "aggregate" interest is more than sufficient to satisfy the jurisdictional amount requirement. Indeed, it is huge: according to the Consolidated Complaint, the monetary relief at issue in this litigation is ***$21 billion***. (Compl. ¶ 5.) This collective claim for such a tremendous amount not only places this case squarely within well-established law concerning "common and undivided" claims, but it also implicates the very concerns -- about case complexity, the sufficiency of judicial resources, and efficient dispute resolution -- that animated Congress in enacting the diversity jurisdiction statute in the

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[5] Plaintiffs' briefs and other pleadings are clearly a valid basis from which to infer facts relating to the jurisdictional analysis. *See, e.g., Lien v. H.ER.C. Prods., Inc.*, 8 F. Supp. 2d 531, 534-35 (E.D. Va. 1998) (denying motion to remand and relying on "the pleadings in this case and the settlement letter issued [by] plaintiff's counsel") (citing *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 755 (4th Cir. 1996) (noting that court reviewing existence of diversity jurisdiction may take into account all information, whether communicated in a "formal or informal manner")).

first place. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927-28). For this independent reason, diversity jurisdiction exists in this case.

B. PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES INDEPENDENTLY SATISFIES THE JURISDICTIONAL AMOUNT REQUIREMENT

This lawsuit is also subject to federal diversity jurisdiction because of plaintiffs' request for punitive damages. (*See* Compl., Prayer for Relief ¶ D.) In its Order, this Court quoted a California district court's statement in *Kanter v. Warner-Lambert Co.*, 52 F. Supp. 2d 1126, 1129-32 (N.D. Cal. 1999), that "[a]ggregation of punitive damages to meet the jurisdictional minimum is not permitted in this circuit." Respectfully, that is not an accurate statement of Ninth Circuit law. While it is true that a number of district courts in this circuit have rejected the idea that punitive damages may be aggregated to satisfy the jurisdictional amount requirement, decisions by both the Ninth Circuit and the Supreme Court make clear that those holdings are untenable.

In *In re Northern Dist. of Calif. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), a California district court conditionally certified a case for class treatment and found that the case was subject to federal diversity jurisdiction because the punitive damages requested by plaintiffs could be aggregated for jurisdictional purposes. *Id.* at 910-11. On appeal, the Ninth Circuit -- pursuant to its obligation to satisfy itself *sua sponte* that jurisdiction existed -- specifically considered the district court's finding of jurisdiction. Rather than rejecting the district court's express holding aggregating the request for punitive damages, the Ninth Circuit accepted the district court's judgment concerning the existence of diversity jurisdiction and

remanded the case for further proceedings in federal court. *See* 693 F.2d at 849.

The Ninth Circuit recently revisited the question of diversity jurisdiction in *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373 (9th Cir. 1997). In *Singer*, the court was required to decide upon the appropriate analytical framework for determining the amount in controversy in a diversity case. After considering various models for assessing the jurisdictional amount, the court stated that "[t]he Fifth Circuit has described an appropriate procedure for determining the amount in controversy on removal." *Id.* at 377 (citing *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995)). *Allen*, the Fifth Circuit precedent adopted by the Ninth Circuit in *Singer*, stands for a single substantive proposition: that "the full amount of alleged [punitive] damages be counted against each plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333. The court in *Allen* reasoned that "[w]hile separate plaintiffs may seek an award in separate cases," the "purpose [of punitive awards] is to protect society by punishing and deterring wrongdoing." *Id.* Because an "individual's damages or harm is relevant only to assessing the defendant's wrongdoing," *id.*, the *Allen* court held that a class claim for punitive damages is a common and undivided claim for jurisdictional purposes. While the Ninth Circuit in *Singer* did not specifically consider the punitive damages question, the court's wholehearted embrace of *Allen* without any qualification shows unmistakably that punitive damages are to be considered in the aggregate for purposes of ascertaining the amount in controversy. On the adoption of *Allen* into Ninth Circuit law, the *Singer* court could not have been clearer: "We agree with the Fifth Circuit." *Singer*, 116 F.3d at 377.[6]

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[6] For a number of reasons, *Singer* is not a surprising case in this regard. For one thing, by the time *Singer* was decided, the Eleventh Circuit also had embraced *Allen* as the touchstone of its diversity jurisdiction analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996) (aggregating punitive damages to satisfy jurisdictional amount requirement). The *Allen* rule of aggregation is also consistent with the Supreme Court's decision in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), where a majority of the Supreme Court for the first time invalidated an award of punitive damages on the ground that the amount of the award was excessive. The strong implication of *Gore* is that defendants may not be subjected without limit to repeated suits seeking punitive damages, since there is a constitutional upper limit on the amount of such damages. (While this argument was urged by the petitioner in *Gore*, the Court declined to address the argument on grounds of waiver. *See Gore*, 517 U.S. at 613 n.4 (Ginsburg, J., dissenting).) In short, since the due-process limited adopted in *Gore* would operate to bar the "nth" cardholder from pursuing an individual claim for punitive damages, the *Gore* decision further shows that claims for punitive damages are "collective and undivided" for purposes of jurisdictional analysis.

In sum, defendants recognize that a number of district courts in this circuit have refused to aggregate requests for punitive damages to satisfy the jurisdictional amount requirement. Defendants respectfully submit that those decisions have misapplied (or perhaps failed to consider) controlling Ninth Circuit and Supreme Court precedent. Under *Dalkon Shield* and *Singer*, plaintiffs' request for punitive damages -- presumably some multiple of the alleged $21 billion in damages stated in the Consolidated Complaint -- is sufficient in itself to satisfy federal jurisdictional requirements.

III. CONCLUSION

For the foregoing reasons, defendants respectfully submit that this Court has federal diversity jurisdiction over the instant action.

DATED: October 21, 1999

Respectfully submitted,

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APPENDIX I

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

MDL Docket No. 1199
C98-153WD
THIS DOCUMENT RELATES TO ALL CASES

DECLARATION OF SHERYL BEHAR IN SUPPORT OF DEFENDANTS' BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE DATED OCTOBER 14, 1999

I, Sheryl Behar, hereby declare as follows:

1. I am a Vice President of Citicorp Credit Services, Inc. ("CCSI"). In my position as a Vice President of CCSI, I have knowledge of the administrative activities and costs associated with the Ford Rebate Program and other aspects of the Ford Rebate Program's operations.

2. On December 31, 1992, Citibank (South Dakota), N.A. ("Citibank") and Ford Motor Company ("Ford") entered into a contract (the "Ford-Citibank Contract") providing for a co-branded credit card and providing for a usage-incentive program (the "Ford Rebate Program"). Subject to the terms of the Ford-Citibank Contract, Citibank was the issuer of co-branded Ford-Citibank Mastercard and Visa credit cards ("Ford Citibank Cards"), and Ford provided cardholders with rebate credits, based on use of the Ford

Citibank Card, that were redeemable toward the purchase or lease of certain vehicles offered by Ford.

3. Citibank, through its affiliate CCSI and other affiliates, provided certain administrative services in connection with the Ford Rebate Program. The administrative services that Citibank provided for the Ford Rebate program included maintaining systems for calculating and keeping records of rebates awarded; maintaining customer information and related services concerning the award of rebates under the Ford Rebate Program; and maintaining the operation of a rebate redemption center that handled record keeping, customer rebate redemption communications, and other functions relating to the redemption of rebates.

4. If the Ford Rebate Program were required to be reinstated, Citibank would incur very substantial costs, far exceeding $75,000.

5. If the Ford Rebate Program were required to be reinstated, Citibank would be forced to incur additional costs of administering the rebate program in the future, including maintaining the redemption program superstructure for the period of reinstatement.

6. Maintaining the required operational superstructure entails large fixed costs and large variable costs for Citibank. The fixed costs that would not depend on the extent of cardholder usage -- such as costs associated with maintaining the pertinent computer systems and software, maintaining customer service procedures and training, and the like -- far exceed $75,000 for a single year of further operation.

7. As one example, operation of the Citibank rebate redemption center, by itself, required 30 employees and a substantial computer network during 1997 (the last year of the program). Citibank's annual costs of operating this rebate redemption center substantially exceeded $75,000 during that year and would exceed $75,000 for each

additional month that the Ford Rebate Program was required to be continued.

I declare under penalty of perjury that the foregoing is true and correct.

Dated October 20, 1999

/s/ Sheryl Behar
Sheryl Behar

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

No. MDL-1199
THIS DOCUMENT RELATES TO ALL CASES

[FILED: October 29, 2001]

ORDER OF DISMISSAL AND REMAND TO STATE COURT

I. INTRODUCTION

Six lawsuits were filed against defendants Ford Motor Company and Citibank (South Dakota), N.A., in courts of different states. Each complaint asserted solely state claims. The plaintiffs alleged that the defendants misrepresented or withheld information about the nature and duration of the Ford/Citibank cardholder rebate program and then wrongfully discontinued that program. The defendants removed each case to federal court on the basis of diversity jurisdiction. Between January 8, 1998, and June 12, 1998, the Judicial Panel on Multidistrict Litigation transferred the six cases to this court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On August 5, 1998, plaintiffs filed a consolidated complaint meant to supersede the six original actions and purporting to sue on

behalf of a nationwide class that would comprise an estimated six million persons. The consolidated complaint asserts three claims, all based on state law (breach of contract, violation of state consumer protection statutes, and unjust enrichment), and pleads jurisdiction solely based on diversity of citizenship.

At the parties' mutual request, class certification and other proceedings were deferred for a period of time. Plaintiffs then moved for class certification and a hearing on the motion was held on July 29, 1999. During the hearing, plaintiffs requested additional discovery and supplemental briefing on the Rule 23 issues; the request was granted and the class action motion was renoted for October 7, 1999.

No motion for remand or challenge to the existence of diversity jurisdiction has been filed.[1] The defendants' supplemental brief opposing class certification, however, raised certain arguments that cast doubt on the existence of jurisdiction.[2] Recognizing that the court's duty is to inquire sua sponte into jurisdiction when appropriate, *see Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 8 (9th Cir. 1974) citing *California v. LaRue*, 409 U.S. 109, 112-13 n.3 (1972)), the court issued a show cause order on October 14, 1999. In response, the plaintiffs make no arguments for diversity jurisdiction even though they pleaded

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1 A motion to remand one of the six cases, *Merrick v. Ford Motor Co.*, No. C98-153WD, was withdrawn before a decision was made.

2 *See* Defs.' Suppl. Mem. Opp'n Class Cert. (Dkt. # 113) at 14 ("This case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions. The Ninth Circuit has made clear that aggregated damages may not be awarded in this type of case. . ."). *See also id.* at 4 ("As to both proposed classes, plaintiffs suggest a variety of aggregated damage-calculation methodologies, while ignoring the fact that claimant-specific jury trials are needed to determine which (if any) cardholders were 'damaged' in the first place.").

it in their consolidated complaint. "[T]he trend," they say, "suggests jurisdiction is questionable." Pls.' Resp. Order Show Cause ((Dkt. # 117) at 3. Defendants, on the other hand, argue that the requirements for diversity jurisdiction are met.

II. ANALYSIS

A. Legal Standard

A defendant may remove a case from state to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. Removal jurisdiction is "strictly construed and federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-9 (1941) and *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). Should the district court determine that it lacks subject matter jurisdiction over the removed case, the district court must remand it to state court. 28 U.S.C. § 1447. A transferee court conducting pretrial proceedings under 28 U.S.C. § 1407 has the power to enter an order to remand. *See* R.P.J.P.M.L. 7.6(a). *See also In re Ivy*, 901 F.2d (2d Cir. 1990). Where, as here, jurisdiction is asserted based on diversity of citizenship, there must be complete diversity between the class representatives and the defendants, and the "matter in controversy" must exceed $75,000. 28 U.S.C. § 1332(a). Here the parties are of diverse citizenship, and the question is whether the consolidated complaint places more than $75,000 in controversy. The defendants, as the parties asserting federal jurisdiction, have the burden of proving by a preponderance of the evidence that the jurisdictional amount requirement is met. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Defendants do not content that the actual damages suffered by any one of the plaintiffs or putative class members exceeds $75,000. Instead they argue that (1) the plaintiffs' "common and

undivided" interest in compensatory damages; (2) the cost of complying with the requested injunctive relief; and (3) plaintiffs' request for punitive damages, each meets the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332(a).

There is consensus among courts but dispute among commentators as to whether to apply the law of the transferee district of the transferor district to multidistrict litigation proceedings. Here, the transferor courts were sited in the Second, Seventh, Ninth, and Eleventh Circuits. In a leading case on the subject, the District of Columbia Circuit held that "the law of a transferor forum on a federal question. . .merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit." *In re Korean Airlines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd on other grounds sub nom., Chan v. Korean Airlines Ltd.*, 490 U.S. 122 (1989). *But see* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 705-6 (1995) (arguing that the law of the transferor forum should be applied). While the case law suggests that the law of the Ninth Circuit should be applied, the court has also considered the laws of the transferor districts in determining what is "ultimately a single proper interpretation of federal law." *In re Korean Air Lines Disaster*, 829 F.2d at 1175.

B. The "Common Fund" Exception to the "Non-Aggregation" Rule

In meeting the jurisdictional minimum, the separate and distinct claims of plaintiffs and class members may not be aggregated. *See Snyder v. Harris*, 394 U.S. 332, 335-36 (1969). Instead, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). Where, however, "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest,"

their claims may be aggregated to reach the jurisdictional minimum. *Zahn*, 414 U.S. at 294 (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)). *See also* 14B Charles Alan Wright et al., Federal Practice and Procedure § 3704 (3d ed. 1998). The paradigmatic cases permitting the aggregation of claims "are those cases which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res." *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997) (citation omitted). *See also Eagle v. AT&T Co.*, 769 F.2d 541, 546-47 (9th Cir. 1985); *Potrero Hill Community Action Comm. v. Housing Auth.*, 410 F.2d 974, 979 (Cir. 1969).

The plaintiffs here allege that the defendants misrepresented or withheld information about the cardholder rebate program and then wrongfully discontinued that program. No plaintiff or putative class member has a compensatory claim greater than $3,500. Defendants contend that the jurisdictional minimum is nonetheless met because plaintiffs have requested as damages an "'aggregate award' of 'class-wide damages' without reference to the damages incurred by any individual cardholder." Defs.' Resp. Order Show Cause (Dkt. # 119) at 8 (quoting Pls.' Suppl. Mem. Supp. Class Cert. (Dkt. #107) at 12-13). Defendants' argument focuses on the wrong issue: the "aggregate award" plaintiffs seek is a class action construct with no link to whether the plaintiffs shared a pre-litigation interest in the subject of the litigation. *See Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1427 (2d Cir. 1997) ("Under the classic 'common fund' cases, what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs."). Each plaintiff's claim arises out of that plaintiff's contract with the defendants, each plaintiff may sue individually to recover from the defendants, and no plaintiff's claim implicates any other plaintiff's rights.

Thus, the monetary claims asserted are not a "common and undivided interest" to enforce a "single title or right" for purposes of meeting the jurisdictional minimum under 28 U.S.C. § 1332(a). *See Gilman*, 104 F.3d at 1428 ("these features of the case do not demonstrate a unitary claim; they merely reflect the problems of theory and proof in this case, and the named plaintiff's efforts to solve or plead around them"). The common fund exception to the non-aggregation principle is inapplicable, and thus, with respect to compensatory damages, defendants have not met their burden of proof concerning the amount in controversy.

C. Cost of Compliance with Injunctive Relief

Defendants next argue that the jurisdictional minimum is met because the cost to them of complying with the requested injunctive relief would be "significantly in excess of $75,000." Defs.' Resp. at 6. The injunctive relief sought by the plaintiffs is the "specific performance of the Rebate Program to plaintiffs and Class members." Cons. Compl. (Dkt. # 18) at 13. Defendants argue that plaintiffs have a "common and undivided interest," that the injunctive relief sought "can only go to class plaintiffs as a class," Defs.' Resp. at 7, and that therefore the non-aggregation rule of *Snyder* and *Zahn* is inapplicable.

This argument is based on testimony that "the fixed costs in operating a rebate program for millions of cardholders," which exceed $75,000 per year, "would not depend on the extent of cardholder usage." Defs.' Resp. at 6. The injunctive relief sought, however, is simply a means to vindicate each plaintiff's separate and individual claim for accrual of rebates for five years. Plaintiffs' having made class action allegations does not alter the nature of the rights asserted. Where, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought, to permit aggregation of the former but not the latter would undermine the principles of

Snyder and *Zahn*. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir. 1977). Just as the compensatory claims may not be aggregated because the plaintiffs do not seek to enforce a common and undivided interest, the injunctive relief based on those same interests may not be aggregated.

The "either viewpoint" rule pressed by the defendants and espoused by some courts—that the amount in controversy may be determined by the "value of the thing sought to be accomplished by the action[, which] may relate to either or any party to the action," *Ridder Bros., Inc v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944)—does not alter the result. Defendants have failed to show that the cost to them of allowing one cardholder to accrue rebates for the full five-year period, the required analysis under the non-aggregation principle of *Snyder* and *Zahn*, would meet the jurisdictional minimum. Whether determined from the plaintiffs' or the defendants' viewpoint, the defendants have failed to show that the value of the injunction enforced as to any one cardholder would exceed $75,000.

D. Punitive Damages

Defendants also argue that the amount in controversy requirement has been met because of the plaintiffs' prayer for punitive damages. They do not contend that any plaintiff's recovery of punitive plus compensatory damages could reach $75,000 (at that level, a recovery for six million class members would be the absurd total of $450 billion); instead, they argue only that the claims should be aggregated. But, as with the requests for compensatory damages and injunctive relief, under *Snyder* and *Zahn* the total claimed as punitive damages may not be attributed to each individual plaintiff for purposes of satisfying the jurisdictional minimum. Defendants' argument rests heavily upon *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). There, the Fifth Circuit held that, under Mississippi law, "the full amount of alleged [punitive] damages [must] be counted against each

plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333. While the Eleventh Circuit has adopted the state-law based rationale of *Allen*, *see Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996), the other circuit courts to consider the issue have rejected the holding in *Allen*, *see Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997); *Anthony v. Security Pac. Fin. Servs.*, 75 F.3d 311 (7th Cir. 1996), and the Fifth Circuit itself has stated that the result in *Allen* is peculiar to Mississippi law, *see Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998).[3]

As with injunctive relief, to permit the aggregation of punitive damages, when actual damages could not be aggregated, "would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Gilman*, 104 F.3d at 1431. Punitive damages are not the sort of "common fund" allowing for the aggregation of damages.

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[3] Contrary to the defendants' arguments, the Ninth Circuit has not addressed this issue. The Ninth Circuit's silence on the issue of aggregation when it vacated *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), does not mean that it agreed with the district court that aggregation of punitive damages was correct. The district court had offered alternative theories for the existence of diversity jurisdiction. 526 F. Supp. at 910-11. It cannot be said on what basis (if any) the Ninth Circuit found the jurisdictional minimum to be met. Furthermore, the court's approval of *Allen* in *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) ("We agree with the Fifth Circuit."), in no way indicates an approval of *Allen*'s aggregation theory. *Singer* did not deal with aggregation of punitive damages, but instead involved whether and to what extent the court should look beyond the complaint and the removal petition to determine the amount in controversy. Because of the Ninth Circuit's holding in *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982), other courts have assumed that the Ninth Circuit would not permit aggregation of punitive damages. *See Ard v. Transcon. Gas Pipe Line Corp.*, 183 F.3d 596, 601 n.3 (5th Cir. 1998); *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1251 (D. Ariz. 1996).

One cardholder's ability to recover such damages against Ford or Citibank for the termination of the rebate program is not dependent on any other cardholder, and a recovery by one cardholder would not implicate the rights of any other cardholder. For example, a cardholder who opted out of the putative class could seek punitive damages without regard for the disposition of the class suit.

Even under the rationale espoused by the Fifth and Eleventh Circuits, the nature of the state laws at issue in this case do not support the aggregation of punitive damages. Both circuits have held that the determination of whether the plaintiffs' claims to punitive damages are common and undivided is driven by state law. *See Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999); *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358-59 (11th Cir. 1996); *Allen*, 63 F.3d at 1333-34. On a motion for rehearing, the *Allen* court emphasized this point. *Allen v. R & H Oil & Gas Co.*, 70 F.3d 26, 26 (5th Cir. 1995) (per curiam) ("[T]he panel is of the unanimous view that the opinion in this case specifically reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state."). *See also Ard*, 138 F.3d at 602 (in distinguishing *Allen*, noting the "peculiar nature of Mississippi law").

It is disputed which state's (or states') laws will apply to the claims of the plaintiffs. *See* Defs.' Supp. Mem. at 8 n.2. The plaintiffs now claim that the laws of New York or South Dakota will apply. Pls.' Supp. Memo. at 4. In a well-reasoned opinion, the Second Circuit rejected the aggregation of punitive damages under New York law. *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997). The court held that because a plaintiff cannot recover punitive damages under New York law unless he "asserts an underlying cause of action upon which a demand for punitive damages can be

grounded," punitive damages may be aggregated only where the underlying cause of action may be aggregated, i.e., represents a common and undivided interest. *Gilman*, 104 F.3d at 1431. South Dakota's law of punitive damages is the same in this respect as New York's. *See Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 928 (S.D. 1994). Thus, even under *Allen* and *Tapscott*, the plaintiffs here do not have a common and undivided interest in the monetary damages or injunctive relief sought, and punitive damages may not be aggregated.

III. CONCLUSION

For the reasons stated, defendants have failed to show by a preponderance of the evidence that the amount in controversy requirement of 28 U.S.C. §1332 has been met. The court therefore lacks subject matter jurisdiction over the consolidated complaint and the six removed cases. The consolidated complaint is hereby dismissed for lack of jurisdiction, and the six cases originally filed in state court, and removed to federal court by the defendants, are now remanded to state court as follows:

Copeland v. Ford Motor Co., No. C98-81 7WD, to the Circuit Court of Tuscaloosa County, Alabama (No. CV-97-970);

Essig et al. v. Ford Motor Co., No. C98-152WD, to the Supreme Court of the State of New York, County of Suffolk (No. 97-18514);

Hornreich et ux. v. Ford Motor C. et al., No. C97-1293WD, to the Superior Court of Washington for King County (No. 97-2-16935-6SEA);

LaGrou v. Ford Motor Co. et al., No. C98-226WD, to the Superior Court of the State of California, County of Los Angeles (No. BC180583);

McCauley v. Ford Motor Co. et al., No. C98-151WD, to the Circuit Court of Cook County, Illinois (No. 97L08315); and

Merrick v. Ford Motor Co. et al., No. C98-153WD, to the Circuit Court for the State of Oregon, County of Multnomah (No. 9708-06079).

The clerk if directed to send copies of this order to all counsel of record.

Dated: October 29, 1999.

/s/
William L. Dwyer
United States District Judge

APPENDIX K

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

MDL-1199
THIS DOCUMENT RELATES TO ALL

Copeland v. Ford Motor Co., No. C98-81WD, to the Circuit Court of Tuscaloosa County, Alabama (No. CV-97-970);

Essig et al. V. Ford Motor Co., No. C98-152WD, to the Supreme Court of the State of New York, County of Suffolk (No. 97-18514);

Hornreich et ux v. Ford Motor Co. et al., (No. C97-2-16935-6SEA)

LaGrou v. Ford Motor Co. et al., No. C98-226WD, to the Superior Court of the State of California, County of Los Angeles (No. BC180583);

McCauley v. Ford Motor Co. et al., No. C98- 151 WD, to the Circuit Court of Cook County, Illinois (No. 97L08315);

Merrick v. Ford Motor Co. et al., No. C98- 153WD, to the Circuit Court for the State of Oregon, County of Multnomah (No. 9708-06079).

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BY DEFENDANT FORD MOTOR COMPANY

Ford Motor Company, defendant herein, appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal and Remand to State Court entered in this case on October 29, 1999.

DATED this 4th day of November, 1999.

MERRICK, HOFSTEDT & LINDSEY, P.S.

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APPENDIX L

THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE FORD MOTOR COMPANY / CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

MDL Docket No. 1199
No. C98-153WD
THIS DOCUMENT RELATES TO ALL CASES
[FILED: Nov. 24, 1999]

NOTICE OF APPEAL

Notice is hereby given that Citibank (South Dakota), N.A., defendant in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal and Remand to State Court entered in this action on the 29th day of October, 1999.

DATED this 24th day of November, 1999.

Respectfully submitted,

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APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A., Cardholder Rebate Program Litigation

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JOHN B. MCCAULEY *et al.*,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, *et al.*,
Defendants.

Nos. 99-36115, 99-36206
(Consolidated)

[Filed Sept. 6, 2001]

[Reported at 264 F.3d 952]

[955] Sidney R. Snyder, Jr., Esq., Merrick, Hofstedt & Lindsey, Seattle, Washington; John H. Beisner, Esq., Brian C. Anderson, Brian P. Brooks (argued), on the brief, O'Melveny & Myers, LLP, Washington, D.C., for defendant-appellant Citibank.

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Jackson Drake, Cooper, Mitch, Crawford, Kuykendall & Whatley LLC, Birmingham, Alabama, for the plaintiffs-appellees.

Bruce M. Berman, Natacha D. Steimer, and Christopher R. Lipsett, Wilmer, Cutler & Pickering, Washington, D.C.; Thomas L. Boeder, Esq., Perkins Coie LLP, for defendant Citibank (South Dakota), N.A.

Appeal from the Decision of the United States District Court for the Western District of Washington; William L. Dwyer, District Judge, Presiding. D.C. Nos. MD-98-01199-WLD, CV-97-01293-WLD, CV-98-00151-WLD, CV-98-00152- WLD, CV-98-00153-WLD, CV-98-00226-WLD.

Before: BROWNING, WALLACE, and T.G. NELSON, Circuit Judges.

WALLACE, Circuit Judge:

Ford Motor Company (Ford) and Citibank (South Dakota), N.A. (Citibank) appeal from the district court's order dismissing the consolidated complaint of several underlying state court lawsuits under 28 U.S.C. § 1332 for lack of subject matter jurisdiction, and remanding these state suits to the courts from which they were removed. We must decide two questions. First, whether the minimum amount in controversy required to maintain a diversity suit in federal court ($75,000) is present in the consolidated action. We have jurisdiction under 28 U.S.C. § 1291 to review the district court's order dismissing the consolidated complaint for lack of subject matter jurisdiction, and we affirm. Second, we must determine whether we have jurisdiction to entertain a challenge to the district court's order remanding the original actions to the state court from which they came. We do not.

I

In early 1993, Ford and Citibank issued a co-branded Ford/Citibank credit card that offered cardholders the

opportunity to save on the purchase or lease of a new Ford vehicle through a usage-incentive program. Under the program cardholders earned a 5% rebate on each purchase made using the Ford/Citibank credit card and could accrue a maximum of $700 in rebates per year (representing $14,000 in purchases) over a five-year period, for a maximum possible rebate of $3,500, redeemable toward the purchase or lease of certain Ford vehicles. On December 31, 1997--less than five years after the program's inception--Ford and Citibank terminated the rebate accrual feature of the Ford/Citibank credit card.

Six state actions were filed in Washington, Oregon, California, Illinois, Alabama, and New York, alleging generally that Ford and Citibank misrepresented or withheld information about the nature and duration of the rebate program and wrongfully discontinued it. Ford and Citibank removed each case to federal district court on the basis of diversity jurisdiction, then petitioned the Judicial Panel on Multidistrict Litigation (Panel) to consolidate **[956]** and transfer the cases to a single district court for pre-trial proceedings, pursuant to 28 U.S.C. § 1407. "Under 28 U.S.C. § 1407, [the Panel] is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district court for coordinated or consolidated pretrial proceedings upon its determination that transfer 'will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.' " Fed. Judicial Ctr., Moore's Federal Practice Manual for Complex Civil Litigation § 31.13 (3d ed.2000).

On January 8, 1998, and June 12, 1998, the Panel transferred the six removed actions to the Western District of Washington "for coordinated or consolidated pretrial proceedings." The transferee district court consolidated the cases on July 16, 1998, and a consolidated complaint was filed on August 5, 1998. Purporting to sue on behalf of a

nationwide class of six million Ford/Citibank cardholders, the consolidated plaintiffs alleged state law causes of action for breach of contract, unjust enrichment and consumer fraud, and plead diversity jurisdiction under 28 U.S.C. § 1332(a). The consolidated plaintiffs sought relief in the form of specific performance, disgorgement, and compensatory and punitive damages.

After transfer and consolidation, Ford and Citibank moved to dismiss the consolidated complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court denied the motion. The consolidated plaintiffs moved for class certification. However, after discovery was completed and the issue had been fully briefed by the parties, the district court deferred judgment on class certification and instead issued an order to show cause why "the consolidated action ... should not be dismissed for lack of jurisdiction, and why [the six underlying actions] should not be ... remanded to state court." Though neither party had challenged the district court's jurisdiction at any point in the proceedings, the district judge properly raised sua sponte the issue of whether the consolidated complaint alleged more than $75,000 in controversy under 28 U.S.C. § 1332(a).

Ford and Citibank filed a memorandum in support of jurisdiction, raising three reasons why the amount in controversy requirement was met: (1) the cost of compliance with the request for injunctive relief would exceed $75,000; (2) the consolidated plaintiffs have a common and undivided interest in their compensatory damages claim, which exceeds $75,000; and (3) the consolidated plaintiffs have a common and undivided interest in their punitive damages claim, which exceeds $75,000.

In an order dated October 29, 1999, the district court held that it "lack[ed] subject matter jurisdiction over the consolidated complaint and the six removed cases." The district court dismissed the consolidated complaint for lack of

jurisdiction and remanded the underlying actions to the several state courts of origin.

Pursuant to the Panel's rules of procedure, *see* R.P.J.P.M.L. 7.6(a), the district court sent a copy of the order to the Panel on November 8, 1999. In the attached letter, the district judge explained:

> [T]his order dismisses, for lack of subject matter jurisdiction, a consolidated complaint filed by the plaintiffs in this court. The dismissal of the consolidated complaint necessitated a disposition of the six original actions filed in state court, removed to federal court on the basis of diversity of citizenship, and transferred by the Panel to the [Western District of Washington] for coordinated or consolidated pretrial proceedings. For lack of subject matter **[957]** jurisdiction, the order remands those cases to state court.

Ford and Citibank timely appealed, challenging both the district court's dismissal of the consolidated complaint and its remand of the underlying actions.

II

We must first consider whether we have jurisdiction to review the district court's order which states "[t]he consolidated complaint is hereby dismissed for lack of jurisdiction." Because the district court's dismissed the "complaint" rather than the "action," the question arises whether the order is final and appealable. "Ordinarily an order dismissing a complaint but not dismissing the action is not appealable under section 1291 unless circumstances make it clear that the court concluded that the action could not be saved by any amendment of the complaint." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir. 1984). However, "[i]f it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable." *Id.* (emphasis added).

Here, the record clearly indicates that the district court intended to dispose of the consolidated action. First, the dismissal did not grant leave to amend. *See id.*; *see also Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987) ("Failure to allow leave to amend supports an inference that the district court intended to make the order final."). We are also aided by the district court's contemporaneous letter to the Panel which demonstrates a clear intention to terminate the case. The district court expressly sent the letter "[i]n compliance with R.P.J.P.M.L. 7.6(a)," which provides that "[a]ctions terminated in the transferee district court by valid judgment ... shall not be remanded by the Panel and shall be dismissed by the transferee district court. The clerk of the transferee court shall send a copy of the order terminating the action to the Clerk of the Panel...." (Emphasis added).

Although a specific dismissal of the action would have been preferable, we conclude in this case that we have jurisdiction to review the dismissal order under 28 U.S.C. § 291.

III

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). Here, diverse citizenship is uncontested. Thus, the sole jurisdictional question is whether the minimum amount in controversy required to maintain a diversity suit in federal court is present. As the parties asserting diversity jurisdiction, Ford and Citibank bear the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds $75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

On appeal, Ford and Citibank do not contend that any plaintiff has an individual damages claim exceeding $75,000. Nor do they contend that the individual plaintiffs' damages claims may be aggregated to satisfy the jurisdictional amount requirement. It is undisputed on appeal that the individual plaintiffs do not have a common and undivided interest in a claim for damages.

However, compensatory damages are not the only form of relief sought. The consolidated plaintiffs also seek injunctive relief, disgorgement, and punitive damages. **[958]** Ford and Citibank contend that each of these claims provides the requisite jurisdictional amount.

A.

Ford and Citibank first argue that their cost of compliance with the request for injunctive relief carries this case over the jurisdictional amount threshold. Relying upon our decision in *Sanchez*, 102 F.3d at 405, they contend that the amount in controversy requirement is satisfied if either party can gain or lose the jurisdictional amount (the so-called "either viewpoint" rule). Here, the consolidated plaintiffs seek specific performance of the rebate program, and Ford and Citibank submit that it will cost them more than $75,000 to reinstate and administer the rebate accrual feature of the Ford/Citibank credit card.

Under the "either viewpoint" rule, the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce. *See Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (holding that for purposes of calculating amount in controversy, "[t]he value of the thing sought to be accomplished by the action may relate to either or any party to the action") (internal quotation omitted). In other words, where the value of a plaintiff's potential recovery (in this case, a maximum of $3,500) is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that

represents the amount in controversy for jurisdictional purposes.

In *Sanchez*, we observed en banc that "*Ridder* ... rejected the 'plaintiff-viewpoint' rule, which states that courts attempting to determine the value of a claim for purposes of the amount in controversy requirement should look only to the benefit to the plaintiff, rather than to the potential loss to the defendant." 102 F.3d at 405 n. 6. *Ridder* stated that in suits involving equitable relief, "if the value of the thing to be accomplished [is] equal to the dollar minimum of the jurisdictional amount requirement to anyone concerned in the action, then jurisdiction [is] satisfied." 142 F.2d at 398. We did not apply *Ridder* in *Sanchez*, however, because the party with the burden of proof failed to provide any evidence to determine the extent of the loss that it would incur by an injunction.

But *Ridder* and *Sanchez* are single-plaintiff cases. Here, there are multiple plaintiffs seeking to sue on behalf of a putative class of six million individuals. We have specifically declined to extend the "either viewpoint rule" to class action suits. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977). This limitation on the rule should apply regardless of whether the requested class has been certified. Indeed, logic would dictate that it should apply to all multi-party complaints. While "[i]t may seem paradoxical to [decline jurisdiction] in the multiplaintiff setting," where the potential loss to defendants typically is well beyond the jurisdictional amount threshold, "it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a [party asserting federal jurisdiction] to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997).

In *Snow*, we acknowledged the inherent conflict between the "either viewpoint" rule and the non-aggregation rule

when calculating the amount in controversy in class action suits seeking equitable relief, and determined that the former must [959] yield. *Snow*, 561 F.2d at 788-91. In light of the Supreme Court's decisions in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973), prohibiting aggregation, we declined to apply *Ridder* in a class action suit seeking damages and injunctive relief, stating that "[in class actions,] the threshold question is aggregation, and it must be resolved affirmatively before total detriment [to the defendant] can be considered." *Id.* at 790. Otherwise, the principle of *Snyder* and *Zahn* would be subverted, i.e., plaintiffs with minimal damages could dodge the non- aggregation rule by praying for an injunction. *See id.* at 791. We recognized that " '[t]otal detriment' is basically the same thing as aggregation," and held that "where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief." *Id.* at 790 (internal quotation omitted).

Thus, under *Snow*, "the proper focus [in multiple plaintiff cases] is not influenced by the type of relief requested, but rather ... depend[s] upon the nature and value of the right asserted." *Id.* Put differently, "[w]hatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *Brand Name*, 123 F.3d at 610, citing *Snow*, 561 F.2d at 790. The question then becomes whether each plaintiff is asserting an individual right or, rather, together the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. If it is the latter, we may then look to the "either viewpoint" rule to determine jurisdiction. If it is the former,

the test is the cost to the defendants of an injunction running in favor of one plaintiff. *See Brand Name*, 123 F.3d at 610.

In an effort to carry this case across the amount in controversy threshold in the face of *Snow*, *Ford* and *Citibank* first contend that the consolidated plaintiffs have a "common and undivided interest" in the injunctive relief they seek, and compliance will cost substantially more than $75,000. Second, they aver that it will cost them more than $75,000 to reinstate and administer the rebate accrual program whether it is done for one plaintiff or six million. Thus, they allege that the "either viewpoint" rule may be applied in this case without running afoul of the non-aggregation principle of *Snyder* and *Zahn*.

1.

Turning to the first point, we are helped to understand the meaning of "common and undivided interest" by *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997), where the court explained that "the 'paradigm cases' allowing aggregation of claims 'are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res.' " *Id.* (citation omitted). That does not fit the case before us in which the claims arising out of the termination of the rebate program do not implicate a "single indivisible res," and could be adjudicated on an individual basis because the consolidated plaintiffs (and putative class members) have no common and undivided interest in accruing rebates under the program. Each plaintiff charged purchases and accrued rebates individually, not as a group. **[960]** Thus, prior to litigation, they shared no common interest. As Ford and Citibank correctly stated in their memorandum opposing class certification, "[t]his case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on

individual patterns of consumer purchasing decisions." They concluded that "[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims ... are separate and distinct." *Id.* at 1424.

In spite of this earlier concession, Ford and Citibank now urge us to adopt *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250 (N.D. Ill. 1996), and hold that the putative class members have a "common and undivided" interest in the "opportunity to accrue rebates" because the injunctive relief requested--reinstating the rebate accrual program-- necessarily would benefit the putative class as a whole. There, plaintiffs sought injunctive relief, requiring the defendants to notify all putative class members of the potential dangers of wearing a line of watches manufactured by the defendants that contained a radioactive isotope. *Id.* at 252-53. The court found that the injunctive relief requested--corrective advertising--would benefit the class as a whole and, thus, held that the putative class members had a "common and undivided interest" because "only the class, and not individual class members, could request the injunctive relief." *Id.* at 254.

We are foreclosed from adopting *Loizon* because our decision in *Snow* tells us that "the proper focus ... is not ... the type of relief requested, but rather ... the nature and value of the right asserted." 561 F.2d at 790. Here, the consolidated plaintiffs assert the right to accrue rebates under the canceled program. That right is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500. "The fact that the plaintiff[s] seek [specific performance] does not through shear [sic] alchemy transform a cause of action which will provide marginal benefits ... into a claim that meets the ... amount in controversy requirement." *Smiley v. Citibank*, 863 F. Supp. 1156, 1164 (C.D. Cal. 1993), relying on *Snow*, 561 F.2d at 791. As we held earlier, to hold otherwise would

permit plaintiffs to circumvent the non-aggregation rule simply by seeking equitable relief.

Therefore, we hold that the consolidated plaintiffs in this case have not "unite[d] to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. "[T]he equitable relief sought [in this case] is but a means through which the individual claims may be satisfied," *Snow*, 561 F.2d at 790, and no plaintiff has an individual claim worth more than $75,000.

2.

The second effort to overcome *Snow* is the argument that because the cost of an injunction running in favor of one plaintiff would exceed $75,000, aggregating the cost of compliance is unnecessary to satisfy the amount in controversy requirement. In other words, while the monetary benefit to an individual plaintiff of reinstating the rebate accrual program would be relatively insubstantial, the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million. Thus, Ford and Citibank assert that because the non-aggregation rule would not be violated if their fixed administrative costs were used to establish the amount in controversy requirement, we may look to **[961]** the "either viewpoint" rule to establish the jurisdictional amount.

At first blush, this argument appears consistent with *Snow*. However, it is fundamentally violative of the principle underlying the jurisdictional amount requirement--to keep small diversity suits out of federal court. If the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, "then every case, however trivial, against a large company would cross the threshold." *Brand Name*, 123 F.3d at 610. "It would be an invitation to file state-law nuisance suits in federal court." *Id.* Therefore, we hold that the amount in controversy requirement cannot be satisfied by

showing that the fixed administrative costs of compliance exceed $75,000.

B.

Next, the defendants contend that the consolidated plaintiffs' unjust enrichment claim, which seeks disgorgement of "billions of dollars" of "ill-gotten benefit[s]," satisfies the amount in controversy requirement. Relying upon *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 48 F. Supp. 2d 37 (D.D.C. 1999), Ford and Citibank argue that "the plaintiff class has a collective right to a disgorgement in the amount of the unjust enrichment." *Id.* at 41. Several district courts have held that a claim for disgorgement falls within the "common and undivided interest" exception to the non-aggregation rule. *See, e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 720 (D. Md. 2001); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 828-29 (E.D. Mich. 1999); *Aetna*, 48 F. Supp. 2d at 41; *but see*, *Arnold v. General Motors Corp.*, 1998 WL 827726 at *2 (N.D. Cal. Nov. 18, 1998), relying on *Snow*, 561 F.2d at 790. These cases "rest their holdings upon the premise that disgorgement is a form of relief separate from, and independent of, individual damage recovery and that disgorgement 'would inure to the benefit of the class rather than vindicate any alleged violations of individual rights.'" *Microsoft*, 127 F. Supp. 2d at 720, quoting *Aetna*, 48 F. Supp. 2d at 41.

The Second Circuit rejected this argument, emphasizing that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs." *Gilman*, 104 F.3d at 1427. The court held that, despite its cloak of collectiveness, the plaintiffs' disgorgement claim was not aggregable for jurisdictional purposes because "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of defendant." *Id.* (internal quotation

omitted). That is, simply because the plaintiffs request disgorgement of "all benefits" does not establish that the right which they seek to enforce is collective.

We agree with the Second Circuit. We point out that this position is consistent with our decision in *Snow*, where, as explained previously, we held that the proper focus in determining whether class action claims may be aggregated is not the type of relief requested, but rather the nature and value of the right asserted. 561 F.2d at 790. In the disgorgement context, the germane question becomes whether "the plaintiffs' claims are consistent with a demand for damages based on their individual transactions with [the defendants]." *Gilman*, 104 F.3d at 1425 n. 8.

Applying this to the case before us is not difficult. The "ill-gotten benefit" alleged in the consolidated plaintiffs' unjust enrichment claim is comprised of: (1) the "profit[s] from ... interest charges and **[962]** intercharge fees [Ford and Citibank] collected as a result of the billions of dollar[s] class members, including plaintiffs, charged on their Ford Citibank Cards," which they would not have used but for the canceled rebate accrual feature; and (2) the "expiration of billions of dollars in rebates earned by plaintiffs and class members." The complaint thus demonstrates that the consolidated plaintiffs have no common and undivided interest in the disgorgement of the alleged ill-gotten benefits. They charged purchases and accrued rebates individually, not as a group. Thus, prior to litigation, they shared no common interest. Each cardholder could have brought a separate and individual action to recover the alleged benefits. Thus, "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of the defendant[s]." *Id.* at 1427.

In seeking disgorgement, the consolidated plaintiffs do not unite to enforce a "single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. Therefore, the total disgorgement amount

requested cannot be used to satisfy the jurisdictional amount requirement.

C.

Finally, Ford and Citibank argue that the claim for punitive damages satisfies the jurisdictional amount requirement because the punitive damages sought in this case are a single collective right in which plaintiffs have a common and undivided interest. In support of their argument, they rely on the Fifth and Eleventh Circuit's decisions in *Allen v. R & H Oil and Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), and *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), and our decision in *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

First, *Allen* and *Tapscott*, which held that punitive damages may be aggregated in class suits, have been disavowed by their respective circuits. *See H&D Tire and Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) (holding that *Allen* is not valid precedent because it conflicts with an earlier and, thus, controlling, pre-Fifth Circuit split opinion barring aggregation of punitive damages to establish diversity jurisdiction); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (holding that *Tapscott* is not valid precedent for same reason).

Second, the defendants contend that in *Dalkon Shield*, we "implicitly [held] that punitive damages may be aggregated for [jurisdictional] purpose[s]." They are wrong. In *Dalkon Shield*, we vacated the district court's class certification order but were silent on the issue of subject matter jurisdiction. The district court in *Dalkon Shield* had held that it had jurisdiction because, "[i]n the face of plaintiffs' allegations concerning punitive damages, [the] court cannot say to a legal certainty that the total award will not yield more than [the jurisdictional amount] to each successful claimant." *In re N. Dist. of Cal. Dalkon Shield*

IUD Prods. Liab. Litig., 526 F. Supp. 887, 910 (N.D. Cal. 1981). The district court went on to state that "[t]he claims before this court for an award of punitive damages also satisfy the jurisdictional amount requirement ... [because] the plaintiffs ... have a common and undivided interest in the recovery of punitive damages against the corporate defendant." *Id.* at 910-911. Because the district court's jurisdictional determination was disjunctive, our silence on the issue cannot be read as an implicit endorsement of the latter ground.

[963] Therefore, because we have not squarely addressed the issue, the question of whether punitive damages may be attributed *in toto* to each member of a putative class is a matter of first impression in this circuit. After the Fifth and Eleventh Circuit's retractions of *Allen* and Tapscott, all of the circuits that have considered the question now have answered in the negative. *See Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292 (10th Cir. 2001); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001); *Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000); *Brand Name*, 123 F.3d at 608-09 (7th Cir.); *Gilman*, 104 F.3d at 1431 (2nd Cir.). This view squares with our analogous jurisdictional amount decisions. *See Snow*, 561 F.2d at 790 (holding that the equitable relief sought by a class may not be aggregated where each class member's claim is separate and distinct); *Goldberg v. CPC International, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (holding that attorneys' fees sought by class members cannot be aggregated for purposes of determining the amount in controversy).

Our analysis is substantially similar to our discussion of the disgorgement remedy, and the focus remains, as it must in light of *Snyder* and *Zahn*, on whether the consolidated plaintiffs and putative class members unite to assert a single title or right. Though the consolidated plaintiffs and putative class members in this case

> may indeed share an interest in receiving [punitive] damages ... that has nothing to do with whether--prior to litigation--they jointly held a single title or right in which each possessed a common and undivided interest. It is irrelevant whether successful vindication of claims would create a single pool of recovery to be allocated among multiple plaintiffs; a common interest in a pool of funds is not the type of interest that permits aggregation of claims under the "common fund" doctrine.

Gilman, 104 F.3d at 1430. Or, as the Seventh Circuit stated in *Brand Name*, "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victim's of the defendant's misconduct" because "[a] plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant." 123 F.3d at 608-09; *see also*, *Allen*, 63 F.3d at 1334. Each consolidated plaintiff and class member could bring an individual action for punitive damages and have his or her rights adjudicated without implicating the rights of every other person claiming such damages. *See Gilman*, 104 F.3d at 1430. "Claims for punitive damages, like claims for compensatory damages, are brought together in a class action for the convenience of the plaintiffs," not because the plaintiffs share a common and undivided interest in a single, indivisible res. *See id.*

We join our sister circuits and hold that "punitive damages asserted on behalf of a [putative] class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest." *Gilman*, 104 F.3d at 1431. "To hold otherwise ... would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Id.*

For the foregoing reasons, we hold that Ford and Citibank have not met their burden of establishing that the jurisdictional amount in this case exceeds $75,000. The district court properly dismissed the consolidated **[964]** complaint for lack of subject matter jurisdiction.

IV

Last, Ford and Citibank contend that the district court erred w[illegible]n, after dismissing the consolidated complaint for lack of jurisdiction, it remanded the six underlying actions to their respective state courts of origin. They argue that the district court's dismissal of the consolidated complaint simultaneously terminated the underlying actions because the consolidated complaint superseded all previous complaints filed by the plaintiffs, rendering them "non-existent." Thus, the defendants assert that dismissing the consolidated complaint left the district court with nothing to remand and no authority to "revive" the underlying actions.

We first test our own jurisdiction: is the district court's remand order subject to our review? 28 U.S.C. § 1447(d) generally forbids appellate review of remand orders: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." However, the Supreme Court has interpreted section 1447(d) to prohibit "only remand orders issued under § 1447(c)." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) (abrogated on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)). That is, remand orders based upon any defect in removal or lack of subject matter jurisdiction are immune from review. *See* 28 U.S.C. § 1447(c); *Thermtron*, 423 U.S. at 351, 96 S. Ct. 584.

Here, the district court specifically held that it "lack[ed] subject matter jurisdiction over the consolidated complaint *and* the six removed cases" because Ford and Citibank failed to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332(a). (Emphasis added). Therefore, it dismissed the

consolidated complaint and, pursuant to section 1447, remanded the six underlying actions to state court. Thus, it would appear clear that we are prohibited from reviewing the district court's remand order under section 1447(d).

However, Ford and Citibank argue that the remand order is not immune from our review because the district court did not, in fact, base its decision to remand on a lack of jurisdiction. *See Thermtron*, 423 U.S. at 350, 96 S. Ct. 584 (holding that the prohibition against review does not extend to remand orders entered on grounds not provided by section 1447). They contend that the district court's letter to the Panel "made clear that the remand component of its order was occasioned by docket-management considerations rather than by any jurisdictional finding." This is simply wrong. The letter expressly stated that "for *lack of subject matter jurisdiction*, the order remands [the underlying] cases to state court." (Emphasis added) There is not a word about docket management, or any other ground not provided by section 1447. Thus, the Thermtron exception does not apply.

Next, Ford and Citibank argue that they do not appeal the propriety of the district court's jurisdictional decision with respect to the underlying cases--which section 1447(d) would prohibit--but rather, they dispute the district court's *power* to render the decision in the first place. They contend that because "[t]he consolidated complaint superseded each of the original complaints, effectively establishing a single lawsuit," dismissal of the consolidated complaint terminated the underlying actions too. Thus, they argue, the district court erred by remanding "non-existent" actions to state court.

[965] Because this argument takes aim at the district court's *authority* to issue the remand order, we have jurisdiction to address the narrow question whether the consolidated federal complaint superseded the underlying state actions in such a way that they were in effect non-existent. *See N. Cal. Dist. Council of Laborers v. Pittsburg-*

Des Moines Steel Co., 69 F.3d 1034, 1038 (9th Cir. 1995) ("[U]nder Thermtron, we have jurisdiction to decide whether a district court has the power to do what it did in issuing a remand order, although we cannot examine whether a particular exercise of power was proper.") (internal quotations omitted).

Ford and Citibank begin their argument with the premise that a consolidated complaint is "akin to an amended complaint," which "supersedes the original, the latter thereafter being treated as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). They thus contend that the consolidated complaint amended the original state complaints, rendering them "non- existent." However, they provide no authority for this proposition. The cases on which they rely merely stand for the unremarkable propositions that: (1) an amended complaint supersedes an original and (2) in a consolidated action, a consolidated complaint is the operative pleading and supersedes all previously filed complaints. No authority supports the contention that a consolidated complaint touches or disturbs underlying state claims.

Nor is there anything cited to us in the record that demonstrates the district court meant for the complaints in the remand cases to disappear. On the contrary, the plaintiffs "consolidate" their efforts into one document which becomes the operative pleading. No court order did anything more than this. Once that umbrella complaint was dismissed, it left the underlying state removed complaints intact. Therefore, the district court did not exceed its authority in remanding the underlying removed actions to state court and, pursuant to section 1447(d), we lack jurisdiction to review its decision.

AFFIRMED IN PART AND DISMISSED IN PART

/s/_____

[Judge Name]

Supreme Court, U.S.
FILED
MAY 6 2002

(10)

No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether the amount-in-controversy requirement of the diversity statute is satisfied where a class representative seeks an injunction that would cost the defendant more than $75,000 to implement whether the injunction applies to one plaintiff or all class members.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption and to the unidentified class members, Ricky A. Copeland, Gerald Essig, Howard S. & Lynette M. Hornreich, John La Grou, Jeffrey Scott Merrick, and Thomas Walters are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock. Citibank (South Dakota), N.A., is a wholly-owned subsidiary of Citibank, N.A., and is indirectly wholly-owned by Citigroup Inc. Citigroup Inc. is a publicly held company.

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Thomson v. Gaskill, 315 U.S. 442 (1942) 13

Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911) 18

Williams v. Taylor, 529 U.S. 420 (2000) 10

Zahn v. International Paper Co., 414 U.S. 291 (1973) ..... *passim*

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28 U.S.C. § 1291 4

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LEGISLATIVE MATERIALS

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Act of Feb. 25, 1879, 20 Stat. 321 12

Act of Mar. 3, 1887, 24 Stat. 552 10

Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1091 10

Act of Jul. 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 10

Federal Court Improvement Act, Pub. L. No. 104-317, 110 Stat. 3847 (1996) 10

Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) 10

H.R. Rep. No. 100-889 (1988) 15

S. Rep. No. 85-1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099 ..... 11, 15

S. Rep. No. 104-366 (1996) 15

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LAW REVIEWS AND BOOKS

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Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* (4th ed. 1996) 16, 23

John E. Kennedy, *Valuing Federal Matters in Controversy: Hohfeldian Analysis in Symbolic Logic*, 35 Tenn. L. Rev. 423 (1968) 17

Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998) 16

Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 Harv. L. Rev. 1369 (1960) 17

Note, *The Jurisdictional Amount Requirement—Valuation from the Defendant's Perspective*, 11 Loy. L.A. L. Rev. 637 (1978) 17

TREATISES AND REFERENCE MATERIALS

14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3703 (1998) 10, 13, 14, 16

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15 James Wm. Moore *et al.*, *Moore's Federal Practice* § 102.100 (3d ed. 2001) 15

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§ 102.109[4] 16

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Black's Law Dictionary (6th ed. 1990) 10

CCH, *State Unfair Trade Practices Law* ¶ 1860 (2000) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Erwin Chemerinsky, *Federal Jurisdiction* § 5.3.4 (3d ed. 1999) 16

Webster's Third New International Dictionary (1993) 11

IN THE

Supreme Court of the United States

No. 01-896

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit (J.A. 107-26) is reported at 264 F.3d 952. The opinion of the district court (J.A. 91-101) is not reported.

JURISDICTION

The opinion of the Court of Appeals was issued on September 6, 2001. The Court of Appeals denied the petition for rehearing and rehearing en banc on October 22, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1332(a)(1) of Title 28, United States Code, provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between . . . citizens of different States . . . ."

STATEMENT OF THE CASE

1. This case arises out of the termination of a credit card rebate program operated by petitioners Ford Motor Company and Citibank (South Dakota), N.A. (the "Rebate Program" or "Program"). In 1993 petitioners inaugurated a credit card benefit that enabled cardholders to accrue and redeem rebates towards the purchase of a new Ford vehicle. J.A. 108-09. Petitioners canceled the rebate accrual component of the Program effective January 1, 1998. In response, cardholders filed six nationwide class actions in the state courts of Washington, Oregon, California, Illinois, Alabama, and New York. *Id.* at 109. The actions alleged generally that one or both petitioners had made misrepresentations concerning the Rebate Program, and that the Program had been wrongfully terminated. *Id.*

Petitioners removed the cases to federal court on the basis of diversity jurisdiction, and then petitioned the Judicial Panel on Multidistrict Litigation to transfer the actions to one district court for pretrial proceedings. The Panel granted the petition and transferred the actions to the Western District of Washington. The named plaintiffs in the various actions then jointly filed a Consolidated Complaint, which, as the district court observed, was "meant to supersede the six original actions." *Id.* at 91-92. The Consolidated Complaint states that the action is within the district court's diversity jurisdiction, asserts claims on behalf of a purported nationwide class of over six million persons, and alleges that petitioners' liability to the class extends into the billions of dollars. *Id.* at 110,

119. The stated purpose of the action is "to hold Ford and Citibank to their end of the bargain." *Id.* at 50. Accordingly, and as is especially pertinent here, the Consolidated Complaint seeks an injunction "[a]warding specific performance of the Rebate Program to plaintiffs and Class members." *Id.* at 62. The requested "specific performance" would require petitioners to reinstitute the Rebate Program so as to provide class members the opportunity to accrue rebates again.

Following completion of discovery on the question of class certification, the district court *sua sponte* issued an order to show cause why the Consolidated Complaint should not be dismissed for lack of jurisdiction for failure to satisfy the $75,000 amount-in-controversy requirement. J.A. 110.[1] In response, petitioners demonstrated that the plaintiffs have a common and undivided interest in their claim for an injunction compelling specific performance of the now-terminated Rebate Program. Petitioners also introduced undisputed evidence demonstrating that the fixed costs of reinstituting and maintaining the Rebate Program—*i.e.*, restoring the opportunity to accrue rebates and re-establishing the business apparatus for identifying eligible purchases and tracking the accumulation of rebates—would far exceed $75,000, even if the relief were awarded only to one plaintiff. On the basis of that uncontroverted record, the district court acknowledged that "the fixed costs in operating a rebate program . . . exceed $75,000" and do "not depend on the extent of cardholder usage." *Id.* at 96 (internal quotation marks omitted). Respondents did not challenge that finding below.

While acknowledging that the fixed costs of re-establishing the Rebate Program would exceed $75,000, the district court concluded that those costs are irrelevant to the amount-in-controversy analysis. *Id.* at 96-97. In the court's view, because no individual cardholder could accrue more

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[1] It is undisputed that the Consolidated Complaint satisfies the requirement of complete diversity among the parties. J.A. 112.

than $3,500 in rebates under the Rebate Program, the "value of the [requested] injunction" with respect to any one class member could not exceed $3,500, irrespective of petitioners' cost of complying with the injunction as to one plaintiff. *Id.* The district court rejected petitioners' remaining amount-in-controversy arguments and dismissed the Consolidated Complaint for lack of jurisdiction. *Id.* at 100.

2. The Ninth Circuit affirmed in part and dismissed in part. After confirming that it had jurisdiction to review the district court's order,[2] the court addressed whether petitioners' costs of complying with the requested injunction satisfied the amount-in-controversy requirement. The court began by observing that its prior decisions adopt the "either viewpoint" rule—instead of the "plaintiff's viewpoint" rule—as the governing standard. *Id.* at 113. Under that rule, "the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce," *id.*, not just the amount at stake for the plaintiff. "In other words," the court explained, "where the value of a plaintiff's potential recovery (in this case, a maximum of $3,500) is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes." *Id.*

After describing the application of the "either viewpoint" rule to claims for injunctive relief, the court held that the rule applies to class actions (and other actions involving multiple plaintiffs) where the plaintiffs have a "common and undi-

[2] As the court of appeals observed, the original complaints filed in various state courts and then removed to federal court were replaced by a Consolidated Complaint filed in the district court, J.A. 109-10, and the district court's order dismissed, rather than remanded, the action as defined in the Consolidated Complaint, *id.* at 112 ("[T]he record clearly indicates that the district court intended to dispose of the consolidated action."). Accordingly, the court concluded that it had jurisdiction to review the dismissal order under 28 U.S.C. § 1291. *Id.*

vided interest" in the requested injunction. *Id.* at 115. But where the requested injunction reflects a collection of "separate claims" made by each individual plaintiff, the court concluded, the "either viewpoint" rule is in tension with the settled rule barring aggregation of separate and distinct claims to satisfy the jurisdictional minimum. *Id.* at 114-15. The court did not hold, however, that the defendant's costs of complying with an injunction are wholly irrelevant in cases involving separate and distinct claims. Rather, "the test" in those circumstances "is the cost to the defendants of an injunction running in favor of one plaintiff." *Id.* at 115-16 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997)).

Applying those standards here, the court first determined that the plaintiffs do not possess a "common and undivided" interest in their request for an injunction compelling reinstatement of the Rebate Program. *Id.* at 116-18. The court held that its prior precedents foreclosed the argument that the "the injunctive relief requested—reinstating the rebate accrual program—necessarily would benefit the putative class as a whole." *Id.* at 117. In the court's view, the plaintiffs' claimed right to accrue rebates under the Rebate Program "is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500." *Id.* Accordingly, the court held that the class did not possess a common and undivided interest in obtaining specific performance of the Rebate Program.

Having determined that each class member asserts a separate and distinct claim for an injunction requiring reestablishment of the Rebate Program, the court then addressed petitioners' evidence that "the cost of [the] injunction running in favor of one plaintiff would exceed $75,000." *Id.* at 118. The court accepted the district court's finding that "the fixed costs to [petitioners] of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million." *Id.* In the court's view, how-

ever, premising jurisdiction on the cost of complying with an injunction in favor of a single plaintiff would conflict with "the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." *Id.* According to the court, if "the administrative costs of complying with an injunction were permitted to count," "then every case, however trivial, against a large company would cross the threshold." *Id.* (internal quotation marks and citation omitted). The court held for those reasons that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.* at 118-19.

SUMMARY OF ARGUMENT

The diversity statute grants the federal district courts original jurisdiction of all "civil actions" involving diverse parties where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1). The class claim at issue here seeks reinstatement of the credit card Rebate Program previously offered to cardholders nationwide. Uncontested record evidence establishes that reinstating the Program would cause petitioners to incur fixed costs far exceeding the statute's $75,000 amount-in-controversy requirement, whether the award were for the benefit of the entire class or for just a single plaintiff.

There are only two potential arguments for why this undisputed evidence does not establish that the "matter in controversy exceeds the sum or value of $75,000": first, that the matter in controversy can never be evaluated from the defendant's perspective; and second, that costs such as those at issue here must be excluded from the amount-in-controversy analysis in class action and other multi-plaintiff cases. Both of those arguments are without merit.

I. The text of the diversity statute and this Court's treatment of it both confirm that the amount-in-controversy requirement is satisfied if the case meets the jurisdictional

minimum from either party's perspective (the "either viewpoint" rule). Nothing in the ordinary meaning of the controlling statutory terms "sum," "value," or "matter in controversy" suggests that they pertain only to the amount at stake for the plaintiff. Indeed, by referring to the "matter *in controversy*," the statute naturally evokes the perspectives of both sides to the "controversy." Accordingly, for over a century the Court has described the matter in controversy as the "pecuniary result" not just to the plaintiff, but to "one of the parties" to the case. *Smith v. Adams*, 130 U.S. 167, 175 (1889). And as early as *Market Company v. Hoffman*, 101 U.S. (11 Otto) 112 (1879), the Court held that the "matter in dispute" exceeded the jurisdictional amount based *solely* on the cost to the defendant of an injunction entered against it.

Permitting claims to be evaluated from either party's perspective also best promotes the basic purposes of the diversity statute in general, and the amount-in-controversy requirement in particular. Especially when considered in tandem with the removal statute, the diversity statute has always operated to protect out-of-state parties—especially defendants—from the vicissitudes of state court litigation. It would be incongruous, in light of this general attentiveness to the position of defendants in diversity actions, to conclude that the statute forecloses all consideration of the defendant's perspective when determining the amount in controversy. More specifically, permitting consideration of the defendant's costs is entirely consistent with the fundamental purpose of limiting diversity jurisdiction only to cases of a prescribed financial magnitude. That purpose is satisfied in any case with large sums at stake for either party.

This case fits that description. The class claim for injunctive relief seeks reinstatement of a nationwide credit card Rebate Program, the fixed costs of which would far exceed $75,000 *per month*. There is simply no reason in the text or purpose of the statute, or in this Court's cases, to exclude such costs from the amount-in-controversy calculus.

II. The Ninth Circuit's conclusion that petitioners' fixed costs of complying with the requested injunction could not satisfy the amount-in-controversy requirement is based on a fundamental misunderstanding of the "non-aggregation" principle as applied to class actions. *See Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). Under that principle, where multiple plaintiffs with "separate and distinct" claims join in one action, each plaintiff's claim must separately satisfy the jurisdictional minimum. But if the plaintiffs jointly seek to enforce a "common and undivided" right or interest, the amount-in-controversy requirement is satisfied if their collective interest crosses the jurisdictional threshold. The purpose of the principle is to ensure that the procedural device of joinder (whether as a class or otherwise) is not used to aggregate separate and distinct, jurisdictionally insufficient claims as a means of manufacturing federal jurisdiction where it would not otherwise exist. Here, whether the plaintiffs' request for an injunction is viewed as asserting the separate and distinct claims of multiple plaintiffs or as a claim for common and indivisible relief, the non-aggregation principle presents no obstacle to jurisdiction.

a. If the plaintiffs in this case are deemed to assert separate and distinct claims for injunctive relief, the amount in controversy is the cost to petitioners of reinstating the Rebate Program for a single plaintiff. Here, the fixed component of those costs substantially exceeds $75,000 whether the claim is considered on a class-wide or single-plaintiff basis. Recognizing jurisdiction in this case is thus entirely consistent with the "non-aggregation" principle: Jurisdiction results not from the combination of individual, jurisdictionally insufficient claims, but from the fact that petitioners would incur large fixed costs even if the injunction were awarded to only one plaintiff. To prevent jurisdiction from being premised on those costs would be to exclude them entirely from the jurisdictional analysis. Such exclusion finds no support in the text or purposes of the diversity statute.

b. The same result naturally obtains if plaintiffs' request for reinstatement of the entire Rebate Program is viewed as asserting a common and undivided interest. One typical characteristic of such claims is that the defendant has no stake in the number of plaintiffs seeking the relief at issue or in the ultimate apportionment of that relief. That is the case here: The relief at issue is reinstatement of the entire Rebate Program, and the act of reinstating that Program would impose the same substantial fixed costs on petitioners regardless of the number of plaintiffs in this case. Indeed, the fixed costs of reinstating the Rebate Program are not even susceptible to "apportionment" among plaintiffs. Another typical characteristic of common and undivided claims is that the plaintiffs are collectively interested in the same relief, in that an award of that relief, even to a single plaintiff, would benefit the entire class. That is also true here: Reinstatement of the rebate program, if awarded to even one plaintiff, would benefit the entire class of cardholders. For these reasons, the claim reflects the plaintiffs' common and undivided interest in reinstatement of the Program.

ARGUMENT

I. THE AMOUNT-IN-CONTROVERSY REQUIREMENT IS SATISFIED WHEN THE COST TO THE DEFENDANT OF COMPLYING WITH THE REQUESTED INJUNCTION WOULD EXCEED THE JURISDICTIONAL MINIMUM.

The diversity statute grants the federal district courts original jurisdiction of "all civil actions" involving diverse parties where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1). The threshold question in this case is whether the "sum or value" of "the matter in controversy" is only the "sum or value" at stake for the plaintiffs (the "plaintiff's viewpoint" rule), or instead also encompasses the "sum or value" at stake for the defendants (the "either viewpoint" rule).

The distinction is often immaterial—particularly where the claim is one for damages—as the recovery sought by the plaintiff usually equals the liability faced by the defendant. *See* 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* ("Wright & Miller") § 3703, at 113 (1998); 15 James Wm. Moore *et al.*, *Moore's Federal Practice* ("*Moore's*") § 102.109[1], at 102-196.8 (3d ed. 2001). But where the "matter in controversy" involves a claim for injunctive relief, awarding the relief can impose costs on the defendant that exceed the benefits to the plaintiff. *See* Wright & Miller, *supra*, § 3703, at 113; *Moore's*, *supra*, § 102.109[1], at 102-196.8. Here, for instance, while an injunction re-establishing the Rebate Program would enable each plaintiff ultimately to accrue no more than $3,500 in rebates, the fixed costs of reinstituting the Rebate Program for one (or more) plaintiffs are well in excess of $75,000. In such circumstances, the choice between the "either viewpoint" and "plaintiff's viewpoint" rule can be determinative. As we explain here, only the "either viewpoint" rule squares with the text and purposes of the statute and with this Court's decisions.

First, the plain text of the diversity statute, which is necessarily the starting point of the analysis, *see Williams v. Taylor*, 529 U.S. 420, 431 (2000), is dispositive.[3] Nothing in

[3] Apart from increases in the jurisdictional amount on five occasions, *see* Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (setting the original amount at $500); Act of Mar. 3, 1887, 24 Stat. 552, 552 ($2,000); Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087, 1091 ($3,000); Act of Jul. 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 ($10,000); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) ($50,000); Federal Court Improvement Act, Pub. L. No. 104-317, 110 Stat. 3847 (1996) ($75,000), the pertinent text of the diversity statute has remained essentially unchanged since its inception in the Judiciary Act of 1789. The only modification is that, whereas the statute originally employed the phrase "matter in dispute," *see* Act of Mar. 3, 1887, 24 Stat. 552; Judiciary Act of 1789, § 11, 1 Stat. 78, that language was replaced in 1911 by the phrase "matter in controversy," *see* Act of Mar. 3, 1911, § 24, 36 Stat. 1091. There is no suggestion in the legislative history (or in any decision of this Court) that the change was a material one, and the terms "matter in dispute" and "matter in controversy" are generally considered interchangeable. *See Black's Law Dictionary* 978 (6th ed. 1990) (defining "matter in controversy" and "matter in dispute" together). Accordingly, this Court routinely relies on decisions interpreting the pre-existing language when construing the current language. *See, e.g.*, *Snyder v. Harris*, 394 U.S. 332, 338-39 (1969).

the ordinary meaning of the controlling statutory terms "sum," "value," or "matter in controversy" suggests that they pertain only to the amount at stake for the plaintiff. "Matter" in this context refers generally to "something that is a subject of disagreement, strife, or litigation," or to "a source or topic of contention." *Webster's Third New International Dictionary* 1394 (1993). Similarly, "matter in controversy" is the "[s]ubject of litigation; [the] matter on which action is brought and issue is joined." *Black's Law Dictionary* 978 (6th ed. 1990). The terms "sum or value" likewise contain no indication of a limitation solely to the plaintiff's viewpoint. *See id.* at 1435 (defining "sum" as "a quantity of money or currency; any amount indefinitely"); *id.* at 1551 (defining "value" as "the estimated or appraised worth of any object or property, calculated in money"). Indeed, the statutory text not only admits of no plaintiff-specific interpretation, but the operative phrase "matter *in controversy*" naturally evokes the perspective of both parties to the "controversy."[4] *Cf. Northbrook Nat'l Ins. Co. v. Brewer*, 493 U.S. 6,

[4] The absence of any plaintiff-specific limitation in the text of § 1332(a) is especially revealing when compared with the immediately succeeding provision, § 1332(b). Congress added the latter provision in 1958 to address plaintiffs' efforts to evade the amount-in-controversy requirement by overstating the relief prayed for in the complaint. *See* S. Rep. No. 85-1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3099-3100. The provision authorizes district courts to deny costs to (or impose costs on) the plaintiff "where the *plaintiff* . . . is finally adjudged to be entitled to recover less than the *sum or value* of $75,000." 28 U.S.C. § 1332(b) (emphases added). (The Judiciary Act of 1789 contained a parallel provision complementing the original statutory grant of diversity jurisdiction. *See* Judiciary Act of 1789, § 20, 1 Stat. 83.) Section 1332(b) thereby specifically refers to the "sum or value" that is "recov-

12-13 (1989) (Court disfavors imposing limitations on statutory grants of jurisdiction where the limitation is not contained in the plain language of the statute itself); *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352 (1961) (same).

Second, this Court has construed the statutory language to encompass the "value" of the "matter" from the perspective of the defendant. In *Market Company v. Hoffman*, 101 U.S. (11 Otto) 112 (1879), over two hundred plaintiffs joined in an action seeking to enjoin the proposed sale of their rights to occupy stalls in a marketplace. The court below enjoined the proposed sale, and the defendant-owner appealed to this Court. "The first question to be determined" was "whether the amount in controversy [was] sufficient to give [the Court] jurisdiction of the appeal."[5] *Id.* at 113. "Upon this," the Court explained, "we have no doubt." *Id.* That was because "the right claimed by" the defendant—i.e., the right to sell the plaintiffs' occupancy rights in the market stalls—was "of

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ered" by "the plaintiff," in marked contrast to the lack of any comparable party-specific qualification in § 1332(a), the general grant of diversity jurisdiction. *Cf. Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citation omitted).

[5] At various times in the past, this Court's appellate jurisdiction has been subject to certain amount-in-controversy requirements. *See, e.g.*, Judiciary Act of 1789, § 22, 1 Stat. 84 (conferring jurisdiction to review circuit courts' final judgments and decrees in civil actions "where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs"). The amount-in-controversy requirement in those statutes mirrored the corresponding terms of the diversity statute in every relevant respect. *See, e.g., Zahn v. International Paper Co.*, 414 U.S. 291, 294 n.3 (1973) (explaining that Court's construction of "matter in dispute" in statutes formerly defining its appellate jurisdiction has been applied to "matter in controversy" in statutes currently defining district courts' original jurisdiction). The particular provision at issue in *Hoffman*, for instance, granted the Court appellate jurisdiction where "the matter in dispute, exclusive of costs, exceed[ed] the value of twenty-five hundred dollars." Act of Feb. 25, 1879, § 4, 20 Stat. 320, 321.

far greater value than the sum which, by the Act of Congress, is the limit below which an appeal is not allowable." *Id.* Citing evidence showing that the enjoined sale would have garnered the defendant more than $60,000, the Court found it "very plain" that "the appeal is one within [its] jurisdiction." *Id.* at 114. *Hoffman* thus found that the "matter in dispute" exceeded the requisite "value" based solely on the cost to the defendant of an injunction entered against it.

Subsequent decisions recognize that the diversity statute permits the amount in controversy to be measured from the defendant's viewpoint. In *Thomson v. Gaskill*, 315 U.S. 442 (1942), for instance, the Court explained that "[i]n a diversity litigation the value of the 'matter in controversy' is measured . . . by its pecuniary consequence to *those involved* . . . ." *Id.* at 447 (emphasis added). And in *Smith v. Adams*, 130 U.S. 167 (1889), the Court stated that "the pecuniary value of the matter in dispute may be determined . . . in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to *one of the parties* immediately from the judgment." *Id.* at 175 (emphasis added). *Cf. Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977) ("In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation."); *Mississippi & Missouri R.R. Co. v. Ward*, 67 U.S. (2 Black) 485, 492 (1862) ("[T]he removal of the obstruction [of which the plaintiff complains] is the matter of controversy, and the value of the object must govern.").[6]

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[6] In *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972), the Court provided additional support for the "either viewpoint" approach by citing favorably *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940), the Wright & Miller treatise, and a Note published in the *Harvard Law Review*, each of which adopts or advocates the "either viewpoint" rule. *See* Wright & Miller § 3703, at 126-27 (discussing *Illinois* on this point). And in *Flast v. Cohen*, 392 U.S. 83 (1968)—which arose when the federal question statute still contained an amount-in-controversy requirement—the Court entertained an appeal in a federal taxpayer suit

Third, the "either viewpoint" rule best promotes the statutory purposes. As this Court has long recognized, a basic purpose of diversity jurisdiction is to protect out-of-state parties from the potential biases of in-state proceedings. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 111-12 (1945) ("Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."). That purpose is reflected in the fact that when Congress first granted diversity jurisdiction in the Judiciary Act of 1789, § 11, 1 Stat. 78, it also granted a corresponding removal jurisdiction enabling out-of-state defendants to remove suits against them filed by in-state plaintiffs, *id.* § 12, 1 Stat. 79. Indeed, because the plaintiff generally can protect itself by choosing where to commence an action, cases involving removal by the defendant most squarely implicate the core concerns of diversity jurisdiction. By permitting the amount in controversy to be evaluated from the defendant's perspective, the "either viewpoint" rule accords with Congress's attentiveness to the posi-

seeking to enjoin operation of portions of the federal Elementary and Secondary Education Act of 1965, noting that "the challenged program involves a substantial expenditure of federal tax funds," *id.* at 103, while nowhere mentioning the value of the case from the plaintiff's perspective.

Glenwood Light & Water Co. v. Mutual Light, Heat, & Power Co., 239 U.S. 121 (1915), does not suggest otherwise. There, the Court held that the district court had erred by evaluating the amount in controversy *only* in terms of the costs to the defendant of complying with the requested injunction. *See id.* at 125-26. The district court's error was not in examining the defendant's costs, but in limiting its analysis only to the defendant's perspective, without considering the benefit to the plaintiff. *See* Wright & Miller § 3703, at 118-20. Under the "either viewpoint" rule, the amount-in-controversy requirement is satisfied whenever the amount at stake for *either* party meets the jurisdictional minimum.

tion of the defendant in diversity cases. It would be incongruous, in light of that attentiveness, to foreclose all consideration of the amount at stake from the defendant's perspective when determining the availability of a federal forum.

The "either viewpoint" rule also best promotes the purpose of the amount-in-controversy requirement itself. By increasing the jurisdictional minimum over time, *see* n. 3 *supra*, Congress has sought to limit the availability of diversity jurisdiction to cases of substantial financial magnitude.[7] Congress, however, has never suggested an intention to provide a federal forum only where substantial sums are at stake from the *plaintiff*'s perspective. Curbing the analysis in that fashion would contradict the central aim of the jurisdictional amount requirement, by "blind[ing] federal courts to the realities of the magnitude of the controversy." *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 393 (7th Cir. 1979) (internal quotation marks and citation omitted).

This case illustrates the point. Exercising federal jurisdiction here is entirely consistent with Congress's intent to ensure that the federal courts do not "fritter away their time in the trial of petty controversies." S. Rep. No. 85-1830 (1958), *reprinted at* 1958 U.S.C.C.A.N. 3099, 3101; *see also Moore's* § 102.100, at 102-165; Wright & Miller § 3705, at 181 (quoting S. Rep. No. 85-1830). The named plaintiffs purport to assert claims on behalf of six million cardholders, and their claim for reinstatement of the Rebate Program could impose costs on petitioners greatly exceeding the jurisdictional minimum. *See* J.A. 118 (court of appeals opinion),

[7] *See* S. Rep. No. 104-366, at 29-30 (1996) ("The adjustment of the jurisdictional amount provides claims with substantial amounts at issue access to a Federal forum, if diversity of citizenship among the parties exists."); H.R. Rep. No. 100-889, pt. 1, at 44-45 (1988); S. Rep. No. 85-1830 (1958), *reprinted at* 1958 U.S.C.C.A.N. 3099, 3101 (Congress sought to establish a jurisdictional minimum "not so high as to convert the Federal courts into courts of big business nor so [low] as to fritter away their time in the trial of petty controversies.").

96 (district court opinion), 62 (Consolidated Complaint at 13), 88 (Behar Decl. ¶¶ 6-7). The record establishes, for example, that the cost of simply operating the Rebate Program's redemption center—leaving aside the costs of recreating an entire administrative apparatus—"would exceed $75,000 for each additional *month* that the [Rebate Program] was required to be continued." *Id.* at 88 (Behar Decl. ¶ 7). There is no basis for construing the diversity statute not to apply to a nationwide claim of such substantial magnitude.

For precisely that reason, the leading authorities in the field agree that the "either viewpoint" rule best serves the purposes of the amount-in-controversy requirement. *See Moore's* § 102.109[4], at 102-199 ("[T]he jurisdictional-amount requirement reflects a congressional judgment that federal judicial resources should be devoted only to those diversity cases in which the financial stakes rise to a predetermined level. It is difficult to understand why those financial stakes are not implicated when *either* party stands to gain or lose the statutorily determined amount or its equivalent."); Wright & Miller § 3703, at 124 ("the purpose of a jurisdictional amount in controversy requirement—to keep trivial cases away from the federal court system—is satisfied when the case is worth a large sum of money to either party"); Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1550 (4th ed. 1996) ("*Hart & Wechsler*") (describing the value of a case to the defendant as a "critical" expression of the amount at stake); Erwin Chemerinsky, *Federal Jurisdiction* § 5.3.4 (3d ed. 1999) (concluding that "either viewpoint" rule "makes the most sense, because the amount in controversy in a lawsuit exceeds $75,000.00 if either the plaintiff or the defendant will have to pay that amount").[8]

[8] The weight of academic commentary is in accord. *See* Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013, 1023 (1998); John E. Kennedy, *Valuing Federal Matters in Controversy: Hohfeldian Analysis in Symbolic Logic*, 35 Tenn. L. Rev. 423, 429-34 (1968); Note, *The Jurisdictional Amount Requirement—Valuation from the Defendant's Perspective*, 11 Loy. L.A. L. Rev. 637, 652 (1978); Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 Harv. L. Rev. 1369, 1374 (1960). *But see* Armistead M. Dobie, *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733 (1925).

Thus, the court of appeals in this case was correct in stating that, "where the value of a plaintiff's potential recovery . . . is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes." J.A. 113-14.[9]

II. PETITIONERS' FIXED COSTS OF COMPLYING WITH THE CLASS CLAIM FOR INJUNCTIVE RELIEF SATISFY THE JURISDICTIONAL AMOUNT REQUIREMENT.

While correctly holding that the "value" of the "matter in controversy" can be measured by the prospective costs to the defendant, the court of appeals erred in concluding that petitioners' costs of complying with the class claim for injunc-

[9] The principal argument in favor of the "plaintiff's viewpoint" approach asserts that it is easier for district courts to assess the amount in controversy if they limit their analysis to the plaintiff's perspective. *See generally* Dobie, *supra*, 38 Harv. L. Rev. 733. Not only is that policy-based argument wholly inadequate to overcome the text and purpose of the statute, it also is deeply flawed on its own terms. As even the leading proponent of the "plaintiff's viewpoint" approach acknowledges, claims for injunctive relief are sometimes difficult to evaluate from *any* perspective. *See id.* at 739 ("Very frequently, in suits for injunction, there is lacking any definite sum of money to which the court can point as the amount in controversy."). Yet precisely because determining the amount in controversy can be so difficult in such cases, there is no reason to exclude at the outset all consideration of the amount at stake from one party's perspective. Here, for example, there is considerably more certainty and simplicity in calculating the amount in controversy from the defendants' perspective. Thus, to the extent the correct approach should "lighten the labors of the courts" in determining the amount in controversy, *id.* at 752, the "either viewpoint" rule provides courts with more sources of potential analytical certainty.

tive relief—even though substantially in excess of $75,000—could not establish the jurisdictional amount. In reaching that conclusion, the court's principal concern was with avoiding infringement of the "non-aggregation" principle. *See* J.A. 118-19. That concern was misplaced in the circumstances of this case.

The non-aggregation rule holds that, where multiple plaintiffs with "separate and distinct" claims join in one action, each plaintiff's claim must separately satisfy the jurisdictional minimum; but if the plaintiffs jointly seek to enforce a "common and undivided" right or interest, "it is enough if their interests collectively equal the jurisdictional amount." *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911). While the principle originally developed over 150 years ago in cases involving joinder of multiple plaintiffs, *see Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832), it has been extended to class actions, *see Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-89 (1939). In *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that the substantial revisions to Rule 23 in 1966 had no effect on the applicability of the non-aggregation rule in the modern class action. Thus, it is now well settled that in class actions—and in all cases involving multiple plaintiffs—"the separate and distinct claims of two or more plaintiffs cannot be aggregated to satisfy the jurisdictional amount." *Snyder*, 394 U.S. at 335.

The courts below treated the class claim for injunctive relief as containing the separate and distinct claims of individual plaintiffs, as to which aggregation is impermissible. For two reasons, however, the non-aggregation rule does not bar jurisdiction here. First, if the plaintiffs are regarded as asserting separate and distinct claims for injunctive relief, the question is whether the cost to petitioners of the particular injunction at issue—reinstatement of the Rebate Program—would exceed $75,000 if sought by only one plaintiff. The answer to that question is yes, as the uncontroverted evidence

establishes. Second, the class claim for injunctive relief can also be treated as an effort to enforce the class members' "common and undivided" interest in obtaining reinstatement of the Rebate Program, in which case the non-aggregation rule simply does not apply.

A. The Cost to Petitioners of Complying With the Injunction in Favor of One Plaintiff Meets the Jurisdictional Minimum.

The courts below concluded that the plaintiffs in this case are asserting "separate and distinct" claims for injunctive relief. If a single plaintiff filed an action seeking the very same injunction at issue here, petitioners' fixed cost of complying with that injunction would satisfy the jurisdictional amount requirement. The claim at issue in this case seeks not simply to reinstate individual plaintiffs' opportunities to accrue rebates, but to reinstitute a particular programmatic method of providing that opportunity—*viz.*, "specific performance of the Rebate Program." J.A. 62. And the uncontroverted record evidence is that "the fixed costs to [petitioners] of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million" and that "the cost of an injunction running in favor of one plaintiff would exceed $75,000." J.A. 118. Inasmuch as jurisdiction would lie if just one plaintiff had sought that injunction, the question is whether the non-aggregation principle operates to undo that jurisdiction simply because one plaintiff joins with others to seek the same relief. It plainly does not.

1. In cases involving "separate and distinct" claims, the non-aggregation principle prevents federal jurisdiction from being manufactured by adding together claims that by themselves do not meet the jurisdictional minimum. *See Zahn*, 414 U.S. at 295 (non-aggregation rule "forbid[s] aggregation of claims where none of the claimants satisfies the jurisdictional amount"). But if each separate and distinct claim would itself impose on the defendant a cost in excess of the

jurisdictional minimum, application of the "either viewpoint" rule yields federal jurisdiction. Nothing in the text or logic of the diversity statute suggests a different rule applies when the "separate and distinct" claim at issue happens to be one for injunctive relief.

Some authorities have misunderstood this point and have concluded that the non-aggregation principle bars courts from evaluating separate and distinct claims for injunctive relief from the defendant's perspective. *See, e.g., Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993); *see also Moore's* § 102-109[6], at 102-202. But as the Seventh Circuit explained in *In re Brand Name Prescription Drugs Antitrust Litigation*, evaluating a claim for injunctive relief from the defendant's viewpoint does not mean examining the *aggregated* cost to the defendant of complying with the injunction for the *entire* plaintiff class. 123 F.3d 599, 610 (1997) (Posner, J.). Instead, where each plaintiff asserts a separate and distinct claim for injunctive relief, the "either viewpoint" rule looks to "the cost to [the] defendant of an injunction running in favor of *one* plaintiff." *Id.* (emphasis added).

That approach fulfills the purpose of the non-aggregation rule: ensuring that the joinder of separate claims in one action as a procedural matter does not create federal jurisdiction where it would otherwise be lacking. *See Zahn*, 414 U.S. at 295 (non-aggregation rule "forbid[s] aggregation of claims where none of the claimants satisfies the jurisdictional amount"); *Snyder*, 394 U.S. at 339-40; *Gibson v. Shufeldt*, 122 U.S. 27, 30 (1887) ("joinder . . . does not enlarge [federal] jurisdiction"). The principle is also reflected in Rule 82, which provides that the Federal Rules—including the rules governing joinder and class actions—"shall not be construed to extend or limit the jurisdiction of the United States district courts." Fed. R. Civ. P. 82; *see* 1937 Advisory Committee's Notes on Fed. R. Civ. P. 82 (Rule 82 confirms that the Rules' broad allowance of claim joinder "does not extend federal

jurisdiction."); *Henderson v. United States*, 517 U.S. 654, 664 (1996).

But just as joinder of separate and distinct claims in one action may not expand federal jurisdiction, such joinder also must not *eliminate* federal jurisdiction over claims that, if considered individually, *would* meet the jurisdictional threshold. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create *or withdraw* federal jurisdiction.") (emphasis added); *Snyder*, 394 U.S. at 341 ("[T]he Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand *or contract* the jurisdiction of the federal courts.") (emphasis added); Fed. R. Civ. P. 82 (Federal Rules "shall not be construed to extend *or limit* the jurisdiction of the United States district courts") (emphasis added). After all, a claim that satisfies the amount-in-controversy requirement if brought alone does not cease to satisfy that requirement when asserted with others. To conclude otherwise would turn the non-aggregation principle on its head. In contrast, an analysis that considers the defendant's cost of providing the requested relief to one plaintiff honors that principle by ensuring that the joinder of that plaintiff's claim with others neither enhances nor diminishes the amount in controversy. *See In re Brand Name*, 123 F.3d at 610.

Here, the large fixed costs associated with providing the requested injunction are clearly *not* derived by aggregating individual, jurisdictionally insufficient claims. It is undisputed that reinstating and maintaining the Rebate Program would entail fixed costs greatly exceeding $75,000, whether the injunction ordering reinstatement were granted in favor of one plaintiff or the entire class. *See* J.A. 118 ("[T]he fixed costs to [petitioners] of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million."). Because those costs are not the product of aggregation, they necessarily satisfy the statute's jurisdic-

tional minimum without running afoul of the non-aggregation principle. *See Zahn*, 414 U.S. at 295 (describing the non-aggregation rule as focusing on whether multiple jurisdictionally insufficient claims have been added together); *Snyder*, 394 U.S. at 338 (describing the non-aggregation rule as prohibiting jurisdiction "where the required amount in controversy can be reached only by aggregating separate and distinct claims"); *In re Brand Name*, 123 F.3d at 610 (describing the approach advocated here as a means of ensuring fidelity to the non-aggregation rule).[10]

2. Although the Ninth Circuit recognized that the cost of providing the requested injunction to a single plaintiff would far exceed $75,000, *see* J.A. 118, it refused to premise jurisdiction on that ground because it believed doing so would be "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." *Id.* In the court's view, if "the administrative costs of complying with an injunction were permitted to count as the amount in controversy, then every case, however trivial, against a large company would cross the threshold." *Id.* (internal quotation marks omitted). The court thus held categorically that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.* at 118-19. That holding is in error.

First, recognizing jurisdiction where the defendant's cost of providing relief to one plaintiff exceeds $75,000 is fully consistent with the objective of "keep[ing] small diversity suits out of federal court" and would not result in the exercise of jurisdiction over "trivial" cases. *Id.* The approach advocated here focuses on *one* claim, and determines whether the defendant has more than $75,000 at stake in respect to that claim alone. As a result, there would be no federal jurisdiction where the defendant's cost of providing relief to one plaintiff is nominal, even though the aggregated cost of providing relief to the class as a whole is substantial. *See, e.g.*, *Snow v. Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977) (amount-in-controversy requirement not met where class sought injunction requiring manufacturer to include wiring kit costing $11.00 with each trailer package). But where, as here, the defendant's costs of complying with an injunction exceed $75,000 even as to a single plaintiff, that claim is neither "small" nor "trivial," and the joinder of it with others in a class action cannot defeat federal jurisdiction.

Second, nothing in the text or purpose of the diversity statute supports the Ninth Circuit's suggestion that "administrative costs" are irrelevant to the jurisdictional amount. The "either viewpoint" approach recognizes that a claim's potential cost to the defendant is a "critical" expression of the amount at stake in the case. *Hart & Wechsler* at 1550; *see supra* at 15-17. That stake is not diminished by labeling some of those costs as "administrative." Indeed, such labeling is tantamount to ignoring altogether the amount at stake from the defendant's perspective. Moreover, a new rule that would exclude so-called administrative costs from the amount-in-controversy analysis would breed substantial confusion and protracted litigation over how to determine whether a cost is "administrative," thus impeding the development of "clear, bright-line" jurisdictional rules and causing "judges and litigants [to] waste their resources in determining the extent of federal subject-matter jurisdiction." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment).

Third, even if a category of "administrative" costs is properly excluded from the jurisdictional analysis, the costs of complying with the requested injunction in this case are in

[10] *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 n.16 (D. Md. 2001) ("[I]n a case such as this where an injunction in favor of a single plaintiff—compliance with which would cost the defendant in excess of the jurisdictional amount—would provide the same benefit to all other plaintiffs, [finding jurisdiction] yields a result consonant with the purpose of the common and undivided interest exception.").

the nature of "restructur[ing] [petitioners'] business or giv[ing] up a lucrative lawful business opportunity," which plainly constitute an important measure of the amount at stake in the case. *In re Brand Name*, 123 F.3d at 610. To reinstate the Rebate Program, petitioners would be required, at a minimum, to re-establish and maintain the business apparatus for verifying purchases and tracking the accrual of rebates, and to employ people to operate that apparatus. *See* J.A. 88-89 (Behar Decl.). These costs are real and substantial, and they certainly differ in nature and magnitude from "ministerial costs of compliance," to the extent such costs do not count towards the amount in controversy. *In re Brand Name*, 123 F.3d at 610. In particular, the costs are categorically different from "the cost of duplicating an injunction . . . and distributing the copies to all the relevant personnel" that the Seventh Circuit has characterized as ministerial. *Id.*

3. It is no answer to suggest, as respondents may, that an individual plaintiff suing by himself would be unlikely actually to obtain broad relief like the reinstitution of the entire Rebate Program. In fact, many states have statutes that purport to authorize broad injunctive relief in individual consumer fraud actions. *See, e.g.*, Cal. Bus. & Prof. Code § 17203; *see generally* CCH, *State Unfair Trade Practices Law* ¶ 1860, at 1509 (2000) ("The overwhelming majority of jurisdictions permit an individual consumer to act as a private attorney general and seek injunctive relief from deceptive conduct."). To be sure, petitioners and other defendants might have strong arguments against the propriety of broad injunctive relief in this or other cases, but such arguments are largely irrelevant to the amount-in-controversy determination. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (existence of valid defense to claim does not deprive court of jurisdiction over claim).

In any event, the exercise of evaluating a class claim for injunctive relief as if it were asserted by one plaintiff is not undertaken for the purpose of calibrating an individual plaintiff's *likelihood* of obtaining the requested relief. Rather, the purpose is to ensure that the cost of complying with the particular injunction the plaintiffs have chosen to seek is not simply an aggregation of jurisdictionally insufficient individualized claims—as it would be, for example, if the injunction sought were for individual awards to each plaintiff (e.g., of money or replacement products). *See Snyder*, 394 U.S. at 338 (explaining that the statute does "not confer[] jurisdiction where the required amount in controversy can be reached *only by aggregating separate and distinct claims*") (emphasis added). If, as here, the injunction would impose essentially equal fixed costs regardless of the number of its beneficiaries, and if those costs would exceed $75,000, then those costs do not come from aggregation of individual claims and thus may be considered in the jurisdictional analysis.

Finally, the argument that a plaintiff could not obtain such a broad injunction if suing individually would, if accepted, simply establish that the class claim for reinstatement of the Rebate Program is really best understood as asserting a "common and undivided" interest in that relief. Plainly, the claim for reinstatement of the Rebate Program is at the core of this case: The plaintiffs are not seeking individual damages awards, and in any event they would not be entitled to individual awards because they have been denied, if anything, only the right to accrue rebates under the Rebate Program. Were plaintiffs to prevail, it is entirely conceivable that a court would grant the requested injunction and order that the Rebate Program be reinstated. To the extent a suit brought by an individual plaintiff could not plausibly yield an injunction ordering that action, that fact simply confirms that the claim asserted here is one that only the plaintiffs acting together could assert. That is, the point underscores that the claim is based on a *collective* interest in reinstatement of the Program, in which case the non-aggregation rule does not apply and the full cost of complying with the injunction can establish the jurisdictional amount. As we develop below,

this may well be the best way to view the plaintiff's claim for relief in this case.

B. The Class Members Have a "Common and Undivided Interest" in Obtaining Injunctive Relief, and the Cost of Providing That Relief to the Class Satisfies the Jurisdictional Amount.

The stated objective of this class action, as noted, is to "to hold Ford and Citibank to their end of the bargain," J.A. 50, and the principal means of doing so is the requested injunction compelling "specific performance of the Rebate Program." *Id.* at 62. Each plaintiff shares an identical and mutual interest in restoring his or her opportunity to accrue rebates through the Rebate Program, and re-establishment of the Rebate Program necessarily would benefit the entire class. Accordingly, that claim can be viewed as exhibiting the central characteristics of a "common and undivided" interest as elaborated in this Court's decisions.

1. The Court's precedents have generally steered clear of adopting rigid and formal rules for determining when a claim is common and undivided. *See Ex Parte Baltimore & Ohio R.R.*, 106 U.S. (16 Otto) 5, 6 (1882) ("It may not always be easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has long been established."). Instead, in order to retain sufficient flexibility to accommodate the wide variety of factual circumstances that may arise in this area, the Court's decisions develop general standards and guideposts to be applied to the particular claim at issue. *See Snyder*, 394 U.S. at 341 (observing that "courts have developed largely workable standards for determining when claims are joint and common"); *Gibson*, 122 U.S. at 30-39 (canvassing decisions and describing general principles).[11] Here, the claim for rein-

[11] The court below thus erred, for instance, in regarding as "common and undivided" only those claims "involv[ing] a single indivisible res." J.A. 116. This Court's decisions suggest no such formal restriction, and have found claims to be "common and undivided" where there was no "indivisible res." *See, e.g., Gibbs v. Buck*, 307 U.S. 66, 71-76 (1939) (determining that plaintiffs' class held common and undivided interest in enjoining enforcement of statute barring blanket licensing of copyrights).

statement of the entire Rebate Program has at least two characteristics this Court has identified as sufficient to mark a claim as "common and undivided."

a. One characteristic typical of such claims is that the plaintiffs seek relief "under one common right, the adverse party having no interest in its apportionment or distribution among them." *Gibson*, 122 U.S. at 30. This approach dates at least to *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1855), where the Court held that an estate's beneficiaries had a common and undivided interest in a claim seeking to recover funds misappropriated from the estate. *Id.* at 5. Although each plaintiff sought to obtain his or her individual share of those funds as a beneficiary, "the matter in controversy . . . was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them." *Id.* at 4-5. Concluding that the plaintiffs thus had a common and undivided interest in the claim for the total sum, the Court emphasized that "it was perfectly immaterial to the [defendant], how [the total sum] was to be shared among them." *Id.* at 5. The Court has found a "common and undivided" interest based on those same considerations in a number of subsequent cases. *See Illinois Cent. R.R. Co. v. Adams*, 180 U.S. 28, 39-40 (1901); *Texas & Pac. Ry. Co. v. Gentry*, 163 U.S. 353, 361 (1896); *Handley v. Stutz*, 137 U.S. 366, 369 (1890); *Gibson*, 122 U.S. at 30; *Estes v. Gunter*, 121 U.S. 183, 185 (1887); *Davies v. Corbin*, 112 U.S. 36, 41 (1884); *The Connemara*, 103 U.S. (13 Otto) 754 (1881).

The same factors aptly describe the class claim for injunctive relief at issue here. As in *Shields* and the subsequent decisions, petitioners have no stake in how the relief requested here—reinstatement of the Rebate Program—is distributed among the plaintiffs. Indeed, it is not even coherent

to consider "distributing" the fixed costs of reinstating the Program among individual plaintiffs. And, as in *Shields* and other cases, petitioners' interest in opposing the relief at issue does not vary with the number of plaintiffs seeking it, for the undisputed fact is that the costs of reinstating the injunction "would be the same whether [the Program reinstatement] is done for one plaintiff or for six million," J.A. 118, and "would not depend on the extent of cardholder usage," *id.* at 96 (internal quotation marks omitted).

While it may be true that an increase in the number of plaintiffs may increase the *marginal* costs to petitioners of the incremental redemption of accrued rebates, the "matter" put "in controversy" by plaintiffs' request for an injunction is the *existence* of the Rebate Program, not its subsequent *use*. The claim does not seek payments of particular rebates to particular plaintiffs—nor could it, since the amount of an individual's accrued rebates depends on purchases yet to occur, and, even then, would have value only if used in the purchase of a Ford vehicle. As a result, no class member has a liquidated claim in any amount at present; instead each class member has only an interest in re-establishing the Rebate Program. The undisputed evidence establishes that petitioners will incur fixed start-up costs of more than $75,000 if required to reinstate that Program, no matter how many plaintiffs seek to benefit from reinstatement of the Program. Award of the requested injunction therefore mirrors in effect the award of a lump sum, *see Adams*, 180 U.S. at 40 ("an action may be maintained for a lump sum, though such sum when collected may be subsequently distributed among various parties, each receiving less than the jurisdictional amount"), and should receive comparable treatment for purposes of measuring the jurisdictional amount.[12]

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[12] *See In re Cardizem Antitrust Litig.*, 90 F. Supp. 2d 819, 836 (E.D. Mich. 1999) (where injunction seeks "relief that will benefit the class as a whole," and defendant's "costs of compliance do not depend upon the size of the class or the identity of its members," "it is based upon a common and undivided interest and constitutes an integrated claim"); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 483 (M.D.N.C. 1998) ("[B]ecause the defendant will sustain this loss even if only one plaintiff were to obtain the injunction, this is a case where plaintiffs have an undivided interest.").

b. A related characteristic typical of "common and undivided" claims under this Court's decisions is that the plaintiffs are collectively interested in the same relief, and that the relief, even if obtained by only one plaintiff, would inure to the benefit of the entire class. *See Gentry*, 180 U.S. at 360-61 (finding that survivors had common and undivided interest in claim which, whether brought by all survivors or just one, would result in a common recovery "for the benefit of all"); *New Orleans Pac. Ry. v. Parker*, 143 U.S. 42, 51 (1892) (stressing that claim "was filed practically for the benefit of the entire number of bondholders"); *Handley*, 137 U.S. at 369-70 (finding that creditors had common and undivided interest in compelling insolvent corporation's stockholders to pay into fund to resolve corporation's debts); *Davies*, 112 U.S. at 41 ("As the matter stands, each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors," and tax collector "cannot act upon separate instructions from the several creditors," but must "collect the tax for the benefit of all alike.").

The claim for injunctive relief at issue here also displays this characteristic. Just as the survivors in *Gentry* brought a claim that, if granted, would necessarily inure to "the benefit of all," 180 U.S. at 361, the plaintiffs in this case have a collective interest in reinstatement of the Rebate Program, from which they all stand to benefit. Moreover, by seeking reinstitution of "the Rebate Program," the claim seeks reinstitution of a program that was structured to serve the nationwide class of cardholders. Awarding that relief would therefore necessarily benefit the entire class of plaintiffs.[13] In fact, the scale

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[13] The fact that plaintiffs' claim for injunctive relief is common and undivided does not establish the propriety of class certification for

of the Rebate Program is inherent to the Program itself: The substantial fixed costs of establishing the Rebate Program require that it be offered on a large scale in order to be economically viable. In short, because the nationwide class of cardholders requests reinstatement of a program designed to serve all subscribing cardholders, awarding the requested injunction necessarily would benefit the entire class.[14]

2. Despite all of this, the court below held that plaintiffs' injunction claim is not "common and undivided," on the ground that each plaintiff "accrue[s] rebates individually, not as a group," J.A. 116, and can accrue "no more than $3,500" in total rebates, *id.* at 117. Relying on that point, the court concluded that a claim "which will provide marginal benefits" to individual plaintiffs of less than $75,000 could not satisfy the amount in controversy requirement without violating the non-aggregation principle. *Id.* at 11a (internal quotation marks omitted).

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the entire action. Plaintiffs' action still implicates such necessarily individuated issues as reliance, causation, and damages.

[14] *See Crawford v. American Bankers Ins. Co.*, 987 F. Supp. 1408, 1413 (M.D. Ala. 1997) ("An injunction which would prevent the Defendant from engaging in a certain form of business in the future has no separable value to each member of the prospective class. Rather, it is prospective injunctive relief to enforce a single 'common right,' not to satisfy 'individual and discrete' claims. Such prospective injunctive relief must be valued as an aggregated whole.") (internal citation and footnote omitted); *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1472-73 (N.D. Ala. 1996) (class claims seeking replacement of allegedly defective automobile engines and advertising campaign warning consumers of the defect "would benefit the putative class as a whole and not just any individual plaintiff. As such, each plaintiff has a common interest in the injunctive and declaratory relief."); *In re Ford Motor Co. Bronco II Prods. Liability Litig.*, No. MDL-991, 1996 WL 257570 at *5-6 (E.D. La. May 16, 1996) (claim requesting that defendant notify all plaintiff class members of alleged defect in its product was a claim requesting relief that, by definition, could be satisfied only if entire class was afforded notice).

The court's analysis simply misapprehends the nature of the requested injunction. As we have already shown, *see supra* at 19, 28, the relief at issue is *not* rebate payments themselves, it is reinstatement of the Rebate Program so that plaintiffs may have the *opportunity* to accrue rebates through the use of their credit cards. Viewed from petitioners' perspective, that claim has a fixed-cost value of more than $75,000, no matter how many plaintiffs ultimately avail themselves of the opportunity to accrue rebates under the Program.

* * * * *

The plaintiffs in this case seek to compel full reinstatement of the Rebate Program. If respondent John McCauley himself had filed an individual action seeking the same relief, it is undisputed that the cost to petitioners of providing that relief would exceed $75,000, thereby satisfying the diversity statute's amount-in-controversy requirement. The mere fact that other plaintiffs seek to join with him to obtain the same relief changes nothing, as Rule 82 makes clear. And even if it were both true and relevant that reinstatement of the Rebate Program was available only to plaintiffs bringing an action as a class, that would merely confirm that the claim for reinstatement is in its nature a claim asserted by the plaintiffs collectively, based on their common and undivided interest in the Program. In short, no matter how the claim for injunctive relief in this case is characterized, the inescapable fact is that the amount put in controversy by plaintiffs' claim far exceeds the jurisdictional minimum. Accordingly, the claim is properly adjudicated in federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. McCAULEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a class action lawsuit seeking damages and injunctive relief may be heard in federal court where, from the face of the complaint, the potential award of damages for "separate and distinct" claims could not possibly exceed the per plaintiff $75,000 amount-in-controversy requirement imposed under 28 U.S.C. § 1332, but where the injunctive relief requested, if granted, would impose administrative costs on one of the defendants in excess of $75,000.

STATEMENT PURSUANT TO RULE 29.6

Respondents are individuals and thus have no corporate parents and do not issue stock.

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Armistead M. Dobie, *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733 (1925) 21, 30

C. T. Drechsler, *Criterion of Jurisdictional Amount to Vest Jurisdiction of Federal Court Where Injunction Is Sought*, 30 A.L.R. 2d 602 (1954 & Supp. 2002) 28

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STATEMENT OF THE CASE

This case concerns a class action involving parties of different states[1] and "separate and distinct" claims of individuals brought exclusively under state law. In *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court held that Rule 23 did not alter the long-standing traditional rule that "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement" of the diversity statute. 394 U.S. at 334; 414 U.S. at 294. In contrast, where "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest," their claims may be aggregated to reach the jurisdictional threshold. *Zahn*, 414 U.S. at 294.

In this case, there is no dispute that Respondents' ("Plaintiffs") underlying claims are "separate and distinct," J.A. 113, nor is there any dispute that this case was brought as a class action and thus is governed by the non-aggregation principle confirmed by this Court in *Snyder* and *Zahn*. In addition to compensatory damages, however, Plaintiffs prayed for injunctive relief. Petitioners contend that the plaintiffs have a "common and undivided" interest in the prayed for relief. Pet. Br. at 26-31. Admittedly, this Court has not spoken conclusively about how to value the amount-in-controversy in the class action context where, like here, injunctive relief is requested as the surrogate through which the "separate and distinct" damage claims can be realized. Yet, there is no doubt that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n*,

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1. It is undisputed that the parties are completely diverse. J.A. 112. References to the Joint Appendix in this brief are abbreviated to "J.A.".

432 U.S. 333, 347 (1977). Here, the value of the "object of the litigation" is less than $75,000 per plaintiff. J.A. 95, 97, 118.

The genesis of this action arises from Ford Motor Company's ("Ford") and Citibank (South Dakota), N.A.'s ("Citibank") termination of a credit card rebate program ("Rebate Program"). In each of the six original actions, Plaintiffs filed their cases under state law asserting state law claims in the state courts of Washington, Oregon, California, Illinois, Alabama and New York. J.A. 109. Generally, Plaintiffs alleged that Ford and Citibank breached their contractual obligation to allow plaintiffs to obtain monetary rebates payable towards the purchase or lease of certain Ford vehicles from their use of the co-branded Ford/Citibank credit card. J.A. 57-58. Plaintiffs further alleged that the ability to obtain rebates was part of the promised consideration owed to plaintiffs for choosing the Ford/Citibank credit card as opposed to the many other cards available on the market. J.A. 51-53. Plaintiffs also alleged that Petitioners' conduct, in terminating the program after duping Plaintiffs and the class into obtaining and using the card, constituted an unfair and deceptive trade practice for which Petitioners are liable for damages under the consumer laws of the various states. J.A. 59-61.

Petitioners removed each case to federal court and petitioned the Judicial Panel on Multidistrict Litigation ("MDL Panel") to consolidate the cases for pretrial proceedings under 28 U.S.C. § 1407. J.A. 109. The MDL Panel granted the petition, plaintiffs consented to the transfer, and all cases were transferred to the Western District of Washington. J.A. 31-32. The district court received the cases for limited, pretrial purposes. *Id.*

In the Case Management Order proposed by the parties, the district court noted that the cases were "consolidated for pretrial purposes," and ordered that "a consolidated complaint" — if one was to be filed — must "be filed within fifteen (15) days after this Order becomes effective." J.A. 41, 44. Although Plaintiffs recognized that they could have, in good faith, challenged the district court's jurisdiction, they made a strategic decision not to engage in a protracted jurisdictional battle that would drain plaintiffs' resources and delay pursuit of the merits of plaintiffs' claims. J.A. 70. Moreover, to further streamline the pretrial proceedings, the plaintiffs filed a single, consolidated complaint. J.A. 70. Among other things, the consolidated complaint sought compensatory and punitive damages, and an injunction reinstating the wrongfully terminated Rebate Program. J.A. 110.

After some initial discovery, Plaintiffs filed a motion for class certification. J.A. 92. The briefing became protracted when Citibank claimed — due to its own faulty record keeping — determination of class membership might be difficult. The district court thereupon allowed the Plaintiffs to conduct discovery to explore the newly-raised "faulty record-keeping" defense, and allowed each party to submit supplemental briefing. At that point — *and in contradiction to the position they now take* — Petitioners' argued: "This case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions. The Ninth Circuit has made clear that aggregated damages may not be awarded in this type of case. . . ." J.A. 92.

Accordingly, after class certification discovery, and following an initial hearing on class certification, *sua sponte* the district court issued an order to show cause why the action

should not be dismissed for lack of jurisdiction and why the six original cases "should not be . . . remanded to state court." J.A. 66. In response, Petitioners argued *only* that the district court had diversity jurisdiction; Petitioners did *not* question that the six original actions (originally filed in state court) must be remanded to their state courts of origin upon a finding of no subject matter jurisdiction in federal court. J.A. 73-86. On October 29, 1999, the district court found that it lacked subject matter jurisdiction over the claims in the consolidated complaint, which it therefore dismissed, J.A. 91-101, and remanded to state court each of the six actions originally filed in state court and removed to federal court by Petitioners. J.A. 100-101.[2]

1. The district court dismissed the consolidated complaint for lack of jurisdiction. In response to the district court's show cause order, Petitioners argued for diversity jurisdiction, while Respondents suggested that jurisdiction was "questionable." J.A. 92-93. Even though no plaintiff or putative class member could possibly have a claim for compensatory damages greater than $75,000, Petitioners contended that the jurisdictional amount-in-controversy was met for three reasons: (i) plaintiffs requested an aggregate award of damages "without reference to the damages incurred by any individual cardholder", J.A. 95; (ii) the cost of compliance with the injunctive relief requested would

2. Petitioners have consistently and erroneously contended that the consolidated complaint "superceded" the original state law complaints thus rendering the state actions "non-existent." *See, e.g.*, J.A. 126. The district court dismissed the consolidated complaint and indicated an intention to dispose of the federal action while remanding the cases back to their original state courts. J.A. 100-101, 124-126. Thus, the court of appeals concluded that the district court's decision was reviewable under 28 U.S.C. § 1291. J.A. 111-112. The district court's order remanding the state actions is not before the Court, and the panel below concluded that it was not reviewable. J.A. 126.

be "significantly in excess of $75,000", J.A. 96; and (iii) punitive damages were prayed for and should be aggregated to determine whether the requisite amount-in-controversy was met, J.A. 97.[3] The district court rejected each one of Petitioners' arguments and dismissed the consolidated complaint for lack of jurisdiction.[4]

The district court rejected Petitioners' "aggregate award" argument because the district court found that the action involved "separate and distinct" claims, and thus under this Court's holdings of *Snyder* and *Zahn*, such claims could not be aggregated to meet the amount-in-controversy requirement. J.A. 94-96.

The district court also rejected Petitioners' argument that the jurisdictional minimum was met by the cost of complying with the injunctive relief requested. The district court did so for two reasons: (i) the cost to comply with an injunction could not serve to satisfy the amount-in-controversy requirement "[w]here, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought," as to do so would run contrary to the "principles of *Snyder* and *Zahn*," J.A. 96-97;[5] and

3. Petitioners did *not* argue to the district court that "any plaintiff's recovery of punitive plus compensatory damages could reach $75,000 (at that level, a recovery for six million class members would be the absurd total of $450 billion)." J.A. 97.

4. The Question Presented to the Court concerns (i) and (ii), thus further discussions of punitive damages and the underlying findings and rulings relevant to the punitive damages issue are omitted.

5. In particular, the district found:

> The injunctive relief sought . . . is simply a means to vindicate each plaintiff's separate and individual claim

(Cont'd)

(ii) even under the "either viewpoint" rule, the district court found that Petitioners "failed to show that the value of the injunction enforced *as to any one cardholder* would exceed $75,000," J.A. 97 (emphasis added).[6] Accordingly, the district court found that Petitioners failed to carry their burden of proving by a preponderance of the evidence that it would cost more than $75,000 to reinstate the Rebate Program even for one plaintiff.

2. The Ninth Circuit affirmed the dismissal of the consolidated complaint for lack of jurisdiction.[7] The panel

(Cont'd)

> for accrual of rebates for five years. Plaintiffs' having made class action allegations does not alter the nature of the rights asserted. Where, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought, to permit aggregation of the former but not the latter would undermine the principles of *Snyder* and *Zahn*.

J.A. 96-97.

6. Contrary to Petitioners' contention that they "demonstrated that the plaintiffs have a common and undivided interest in the their claim for an injunction," the district court found otherwise. J.A. 96-97. Additionally, the only evidence in the record about the monetary cost of compliance with any injunction is the cost to Citibank, J.A. 87-89; there is no evidence in the record that an injunction would impose any similar costs on Ford. In fact, according to the declaration of Sheryl Behar, Citibank provided the "administrative services" under the Rebate Program which, if reinstated, would cost Citibank in excess of $75,000, while "Ford provided cardholders with rebate credits. . . ." J.A. 87-88. As the district court found, these rebate credits could total no more than $3,500 to each plaintiff. J.A. 95.

7. On appeal, Petitioners did not contend that plaintiffs' damages claims could be aggregated to meet the amount-in-controversy requirement, or that plaintiffs' claims were "common and undivided" as opposed to "separate and distinct." J.A. 113.

first confirmed that it had jurisdiction to review the district court's order, J.A. 111-112, and then addressed Petitioners' contention that the cost of compliance with the requested injunctive relief carries them over the jurisdictional threshold. The court began its analysis by reviewing the history of applying the "either viewpoint" rule to multi-plaintiff actions.[8] Under the "either viewpoint" rule, the Ninth Circuit has held that the amount-in-controversy requirement can be satisfied if "the pecuniary result to either party which the judgment would directly produce" exceeds the jurisdictional amount. J.A. 113 (citing *Ridder Bros. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944). However, the panel also noted that *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977), specifically foreclosed application of the "either viewpoint" rule to class actions. J.A. 114.

According to the panel, *Snow* declined to extend *Ridder* to class actions because of the long-standing non-aggregation principle and the Court's decisions in *Snyder* and *Zahn*. It stated, "the threshold question is aggregation, and it must be resolved affirmatively before total detriment [to the defendant][9] can be considered. Otherwise, the principle of *Snyder* and *Zahn* would be subverted, i.e., plaintiffs with minimal damages could dodge the non-aggregation rule by praying for an injunction." J.A. 115 (citation & internal quotation omitted). Accordingly, "where the equitable relief sought is but a means through which the individual claims

8. The Ninth Circuit has rejected the "plaintiff viewpoint" rule when determining the value of non-class claims for purposes of determining whether the amount-in-controversy requirement is satisfied. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 n.6 (9th Cir. 1996) (en banc); *Ridder Bros. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944).

9. Courts equate "total detriment" to aggregation. *See Snow*, 561 F.2d at 790; *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970).

may be satisfied, the ban on aggregation applies with equal force to the equitable as well as monetary relief." *Id.*

Thus, the panel correctly noted that in multi-plaintiff cases seeking declaratory or injunctive relief, the amount-in-controversy is measured by the "nature and value of the right asserted." J.A. 115 (citing *Snow*, 561 F.2d at 790). Furthermore, the panel emphasized that if plaintiffs were asserting a "common and undivided" right, it could look to "either viewpoint" to determine jurisdiction. But if the right asserted was "separate and distinct," the jurisdictional test "is the cost to the defendants of an injunction running in favor of one plaintiff." J.A. 115-116 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997)).

Applying those standards, just like the district court, the panel first held that plaintiffs do not possess a "common and undivided interest in accruing rebates under the program," which is the injunctive relief requested. J.A. 116-117. The court even noted that Petitioners originally argued this position in opposition to the motion for class certification when they concluded "[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common *res*, their claims . . . are separate and distinct." J.A. 117 (quoting Petitioners). In line with Petitioners' earlier position, which is *contrary to the position Petitioners take before this Court*, the panel concluded that the "right [to injunctive relief] is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500." J.A. 117. In other words, the court found that the equitable relief sought in this case and under these facts was merely a "means through which the individual claims may be satisfied" and "no plaintiff has an individual claim worth more than $75,000." J.A. 118.

Following the finding that the injunctive relief claims are "separate and distinct" and valued at no more than $3,500 per plaintiff, the panel proceeded to test whether the cost of an injunction running in favor of one plaintiff would exceed $75,000. Departing some from the disjunctive rationale of the district court,[10] the panel concluded, as a matter of law, that fixed administrative compliance costs that would be imposed if the injunction were granted could not satisfy the amount-in-controversy requirement. The court reasoned that, if permitted, "'every case, however trivial, [brought] against a large company would cross the [jurisdictional] threshold.'" J.A. 118-119 (quoting and citing *Brand Name*, 123 F.3d at 610).

SUMMARY OF ARGUMENT

By its plain terms, the unambiguous diversity statute grants the federal district courts original jurisdiction over "all civil actions" involving completely diverse parties where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1). Thus, one essential element of federal jurisdiction under the diversity statute is the amount or value of the litigation. Here, Plaintiffs seek damages and an injunction as a means to provide value to their individual contract rights. There is no dispute that Plaintiffs' contract claims are "separate and distinct" and thus under this Court's long-settled interpretation of the amount-in-controversy requirement, the value of the claims cannot be aggregated to meet the jurisdictional threshold of $75,000. *Snyder v. Harris*, 394 U.S. 332 (1969). Moreover, according to the parties and the courts below, no plaintiff has an

10. In addition to concluding that the injunctive relief was the means through which plaintiffs sought to satisfy their individual claims, the district court also found that Petitioners had failed to meet its burden of proving that the amount-in-controversy was satisfied even for one plaintiff under the "either viewpoint" rule. J.A. 97. The panel did not disturb this finding.

individual claim exceeding $75,000. However, Plaintiffs prayed for an injunction as well. "In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). Thus, the question in this case is how to value the "object of the litigation" and whether that value exceeds the jurisdictional threshold for each plaintiff.

Petitioners ask this Court to value the "object of the litigation" from the defendant's viewpoint or, alternatively to conclude that plaintiffs' request for injunctive relief is a "common and undivided" interest that may be aggregated to determine the amount-in-controversy. For all of the following reasons, Petitioners' request should be denied and the judgment should be affirmed.

I. The policy of this Court is to construe the amount-in-controversy requirement strictly and against expanding federal jurisdiction. *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *Snyder*, 394 U.S. at 339-40. This is done to respect the proper role of state courts in actuating the federal judicial system and to ensure that the federal courts are not burdened without Congress's explicit authorization. *Healy*, 292 U.S. at 270; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Snyder*, 394 U.S. at 339-40; Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to 'Up the Ante' in Diversity Jurisdiction*, 102 F.R.D. 299, 302-18 (1985).

II.A. The rule for valuing injunctive relief for purposes of determining the amount-in-controversy is settled and has been for some time: "the amount in controversy is measured by the value of the object of the litigation." *Hunt*, 432 U.S. at 347 (citing cases back to 1907). It is generally understood

that the "object of the litigation" is the right or rights that *plaintiffs* seek to protect. In other words, the "matter in dispute" is "the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken." *Smith v. Adams*, 130 U.S. 167, 175 (1889).

Here, the relevant rights that Plaintiffs seek to protect are their separate contractual rights. In particular, plaintiffs seek to hold Ford and Citibank to their bargain and permit each class member to "earn up to $700 in rebates over any consecutive 12-months for a maximum rebate of $3,500 over a 5-year period" toward the purchase or lease of certain Ford vehicles. J.A. 49, 109. The relevant controversy is whether Ford and/or Citibank owe Plaintiffs this right and these rebates.[11] Thus, in this case, the "object of the litigation" is the value of the *right* to be protected and gained by Plaintiffs, which the courts below have valued at less than $75,000 per plaintiff.

Nevertheless, Petitioners contend that the administrative costs imposed by the injunctive relief requested can and should be used to determine the value of the "object of the litigation" in all cases where injunctive relief is requested. Petitioners are mistaken. Such administrative costs are collateral to the rights that plaintiffs seek to protect and thus are not included in the jurisdictional calculus. *Ross v. Prentiss*, 44 U.S. (3 How.) 771, 772 (1845). Indeed, one can see that they are collateral to the "object of the litigation" by virtue of the fact that Plaintiffs are not required to present

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11. There are additional objectives of the litigation under consumer protection statutes and the common law unjust enrichment claim (*e.g.*, disgorgement), but these objectives do not appear relevant to the Question Presented and Petitioners have not emphasized these aspects of the litigation in their briefs at any stage of the litigation. Thus, Respondents similarly omit discussion of these issues.

testimony about these administrative costs to establish their rights, and such administrative costs are no defense to a breach of contract claim. Consequently, Petitioners would not introduce such testimony either. *Cf. Smith v. Adams*, *supra*.

B.1. Furthermore, this Court has historically valued the "object of the litigation" solely from the plaintiff's viewpoint. Indeed, on several occasions, this Court has expressly stated that this is the rule. *See, e.g., Scott v. Frazier*, 253 U.S. 243, 244 (1920) ("It is well settled the . . . amount in controversy must equal the jurisdictional sum as to each complainant."); *Glenwood Light & Water Co. v. Mutual Light, Heat & P. Co.*, 239 U.S. 121 (1915) (holding jurisdictional amount is tested "by the value of the object to be gained by complainant"); *Bitterman v. Louisville & Nashville R.R. Co.*, 207 U.S. 205, 225 (1907) ("[T]he substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but *by the value of the . . . rights of property which the complainant sought to have recognized* and enforced."); *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 336 (1907) ("The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the Exchange [the plaintiff] determines the jurisdiction").

B.2. Given the paramount policy that the plaintiff is the master of the complaint and that the complaint controls jurisdiction, it is easy to understand why the plaintiff's viewpoint is used to test the value of the "object of the litigation." First, such a rule is consistent with the general rule that "the sum claimed by the plaintiff controls" if the claim is made in good faith. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). Second, such an approach is also consistent with the well-pleaded complaint rule and removal statute. *Id.* at 291. Third, the plaintiff's

viewpoint rule is the one bright line rule that is consistent with the long-established right of plaintiffs to decide which jurisdiction to bring his or her case in, and which law to rely upon. If a defendant, by merely recasting the complaint or adding allegations about the cost of the injunctive relief requested, could defeat a plaintiff's choice of law or forum, then, in the words of this Court, "the plaintiff would be master of nothing." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987); *see also Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 281 (1918) (jurisdiction is "to be determined by the allegations of the complaint . . . it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant"). This is especially true in cases brought against large multinational corporations that would likely incur in excess of $75,000 in administrative costs for any injunction issued against them. *See Brand Name*, 123 F.3d at 610.

C. Additionally, considerations of *stare decisis* militate against opening the federal courts to every completely diverse action that seeks injunctive relief, which would be the effect if this Court were to adopt the "either viewpoint" rule as Petitioners propose. Considerations of *stare decisis* are especially important where, as here, the Court is interpreting a statute because Congress is "free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

As noted above, the relevant decisions of this Court have stood for decades and, more importantly, are the products of over 100 years of this Court's jurisprudence. Other than increasing the amount-in-controversy threshold to establishing federal jurisdiction, the relevant text of the diversity statute has remained essentially unchanged by Congress since the statute was originally enacted. Moreover,

Congress has presumably read and understood these holdings when setting the requisite amount-in-controversy. Indeed, Congress has ratified the Court's interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Thus, it would be inappropriate for this Court to expand federal jurisdiction where Congress has chosen not to. *Zahn*, 414 U.S. at 300-01.

Congress's current consideration of S. 1712 and H.R. 2341 (the "Class Action Fairness Act of 2001") implicitly acknowledges that this case cannot presently be brought in federal court. These bills seek to amend 28 U.S.C. § 1332 to federalize class actions and modify the amount-in-controversy requirements to undo the effect of this Court's holdings interpreting section 1332's amount-in-controversy requirement. If enacted, the Class Action Fairness Act would establish the new rules of federal jurisdiction in class actions that Petitioners ask this Court to write but at a different *and higher* threshold, well above the present $75,000.

If Congress chooses to, it can and should amend section 1332 to adopt and incorporate Petitioners' position and fix any perceived error. However, this Court should not pronounce a new rule that would open the federal courts to the hundreds, if not thousands, of state court actions filed across the country annually that pray for injunctive relief, especially at time when this Court has expressed its concern over the caseloads in federal court. *See* 1999 Year-End Report on the Federal Judiciary. Instead, this Court should reaffirm its prior holdings and state clearly that the plaintiff's viewpoint controls the "object of the litigation," and defer to Congress the determination of whether diversity jurisdiction should be expanded to include all diverse cases and/or class actions where plaintiffs seek injunctive relief.

Assuming that the Court rejects the "either viewpoint" approach Petitioners propose and reaffirms its holdings that "plaintiff's viewpoint" determines the amount-in controversy, diversity jurisdiction is lacking here because the value of the "object of the litigation" from the plaintiff's perspective does not exceed $75,000 per plaintiff. Thus, the judgment should be affirmed on this basis alone.

III.A. The non-aggregation principle also precludes federal jurisdiction over this case. According to the traditional interpretation of the diversity statute, the non-aggregation principle holds that the "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." *Snyder*, 394 U.S. at 335. The only time aggregation is permitted in multi-plaintiff cases is where "two or more plaintiffs unite *to enforce a single title or right in which they have a common and undivided interest*." *Id.* (emphasis added).

B. Here, Plaintiffs' claims are separate and distinct. In fact, Petitioners concede this point. J.A. 113, 117. Thus, the non-aggregation principle applies. Furthermore, contrary to Petitioners' position, it does not matter whether Plaintiffs share a "common and undivided" interest in the injunctive relief because the non-aggregation principle applies whenever plaintiffs unite to enforce (i) "a single title or right," that is (ii) "common and undivided," and here. Petitioners concede that Plaintiff do not share a united title or right, even to the relief requested. Accordingly, Plaintiffs' claims cannot be aggregated to meet the jurisdictional threshold.

Additionally, even if Plaintiffs' claims could be aggregated, defendants' costs cannot. Here, the record reveals that although Citibank would incur over $75,000 in administrative costs if an injunction reinstating the Rebate Program were to issue, there is no evidence that an injunction

would impose similar costs on Ford. In fact, according to the declaration of Sheryl Behar, Citibank provided the "administrative services" under the Rebate Program which, if reinstated, would cost Citibank in excess of $75,000, while "Ford provided cardholders with rebate credits. . . ." J.A. 87-88. As the district court found, these rebate credits could total no more than $3,500 to each plaintiff. J.A. 95. Thus, even if the defendant's viewpoint is considered and jurisdiction is tested by "the cost to each defendant of an injunction running in favor of one plaintiff,"[12] finding jurisdiction here violates the non-aggregation principle because the cost to Ford is at most $3,500 per plaintiff. Therefore, the district court's finding that Petitioners failed to meet their burden under the "either viewpoint" rule should be upheld. J.A. 97.

C. Finally, the "either viewpoint" rule, if adopted in the form that Petitioners' request (*i.e.*, to include defendant's administrative compliance costs in the jurisdictional calculus), would create such a porous exception to the non-aggregation principle that the principle would be rendered non-existent. Indeed, as Judge Posner has noted, "every case, however trivial, against a large company would cross the [jurisdictional] threshold," if such administrative costs were included. *Brand Name*, 123 F.3d at 610.

The Court need not take this bait. Not only are such costs collateral to the "object of the litigation" and thus excluded from the definition of amount-in-controversy, *see Ross*, 44 U.S. at 772, but also the Ninth Circuit held that these costs cannot be considered as a matter of law if the non-aggregation principle is to be respected. The Court should affirm the Ninth Circuit's ruling because failing to place such a limitation on the "either viewpoint" rule would mean that the federal courthouse doors would be open to every large corporation

12. *Brand Name*, 123 F.3d at 610.

whenever completely diverse parties sue them and seek injunctive relief — including individual actions — and to every diverse plaintiff who wished access to the federal courts simply by including a prayer for injunctive relief. Not only would such an expansion of federal jurisdiction render the non-aggregation principle effectively meaningless, but it would also be contrary to this Court's interpretations and policies pertaining to the diversity statute. If federal jurisdiction is to be expanded this way, the Court should defer to Congress.

ARGUMENT

I. The Amount-In-Controversy Requirement Under 28 U.S.C. § 1332 Is Strictly Construed Against Expanding Federal Jurisdiction

One of the essential elements of federal jurisdiction under the diversity statute is the amount or value of the subject matter in litigation. By its plain terms, the unambiguous diversity statute grants the federal district courts original jurisdiction over "all civil actions" involving completely diverse parties where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1).[13] Thus, the question presented here is whether this case, in which Plaintiffs seek damages perhaps totaling in the millions and an injunction as a means to provide value to their individual contract rights which admittedly would cost Citibank more than $75,000 to implement, but would not cost Ford more than $75,000 per plaintiff, establishes the requisite amount-in-controversy even though no plaintiff would obtain more than $75,000 in pursuit of his or her separate and distinct contractual claim.

13. For years the federal question jurisdiction statute, 28 U.S.C. § 1331, contained a similar amount-in-controversy requirement. Some of the cases cited in Respondents' brief involve that requirement.

Since the creation of the federal courts with the Judiciary Act of 1789, which has remained essentially unchanged since its inception, suits between citizens of different states, and at times those based on a federal question, and involving less than a certain prescribed amount could neither be brought in a federal court originally nor removed to federal court from a state court. Indeed, the only material changes to the statute have been for Congress to limit the number of federal cases by increasing the amount-in-controversy threshold.[14] In *Healy v. Ratta*, 292 U.S. 263 (1934), this Court held, with regard to the policy of Congress in fixing a minimum jurisdictional amount for the federal courts:

> Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the [diversity] statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Id. at 270; *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)

> The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts,

14. *See* Pet. Br. at 10 n.3 citing the requisite amounts and the amendments to the diversity statute.

> requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

(Internal quotation omitted). *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) ("The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts."); *Snyder*, 394 U.S. at 339-40 (refusing to overrule the "aggregation doctrine" in part because it would rewrite the "settled interpretation" of the diversity statute incorporating that doctrine, and because it would expand the federal caseload which would "undercut the purpose" of the amount-in-controversy threshold requirement). Thus, it is one governing principle and purpose of the diversity statute — and perhaps the principal purpose — to narrow federal jurisdiction in favor of jurisdiction in state courts, and correspondingly limit those cases that can be brought in federal court.[15] *See* Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to 'Up the Ante' in Diversity Jurisdiction*, 102 F.R.D. 299, 302-18 (1985).

The strict reading of the scope of diversity jurisdiction applies here and to Petitioners' request that this Court expand federal jurisdiction by revisiting how to value the "object of the litigation" to include the costs to the defendant of the requested injunctive relief. Because such a reading of the diversity statute would be inconsistent with, if not contrary to, the Court's settled jurisprudence, Petitioners' request should be rejected.

15. Federal courts, of course, are courts of limited jurisdiction. Indeed, federal courts must, at all times, be ever vigilant in ensuring that the requisite amount-in-controversy is satisfied, else jurisdiction is lacking and the case must be dismissed. *See, e.g., Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Saint Paul*, 303 U.S. at 290-91; *North Pacific S.S. Co. v. Soley*, 257 U.S. 216, 221 (1921).

II. The Rule For Valuing Injunctive Relief To Determine Whether The Amount-In-Controversy Requirement Under The Diversity Statute Is Well-Settled And Prohibits Federal Jurisdiction In This Case Because The Value Of The "Object Of The Litigation" Does Not Exceed The Requisite Amount-in-controversy

A. When An Injunction Is Prayed for, the Amount-In-Controversy Is Measured by the Value of the "Object of the Litigation."

This Court has interpreted and settled what is a "matter in controversy" for purposes of the diversity statute in suits, such as this one, seeking in an injunction: "it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt*, 432 U.S. at 347. As has been noted by commentators and courts over the years, it is difficult to establish a rule more concrete than this, because the "object of the litigation" can and will differ depending on the facts and circumstances of each case. *See, e.g., Elliott v. Empire Natural Gas Co.*, 4 F.2d 493, 496 (8th Cir. 1925) ("No rules as to how jurisdictional amount shall be arrived at can be laid down governing every case, for there are different shades of fact differentiating the various cases, and each one is dependent upon its own particular facts and circumstances.") It is generally understood that the subject or object of the litigation or matter in dispute is "the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken." *Smith v. Adams*, 130 U.S. 167, 175 (1889); *see* Note, 34 COLUMBIA L. REV. 311, 311 (1934). Stated otherwise, the "matter in controversy" or "the object of the litigation" is properly understood as the right(s) sought to be protected by the complaint. Thus, under *Hunt*, it is the value of these rights that determines whether the amount-in-controversy requirement is satisfied when injunctive relief is requested.

Here, the object of Plaintiffs' complaint is to hold Ford and Citibank to their bargain and permit each class member to "earn up to $700 in rebates over any consecutive 12-months for a maximum rebate of $3,500 over a 5-year period" toward the purchase or lease of certain Ford vehicles. J.A. 49, 109. The relevant controversy is whether Ford and/or Citibank owe Plaintiffs this right and these rebates. Thus, in this case, the "object of the litigation" is the value of the *right* to be protected and gained by Plaintiffs; it is not how much it would cost the Petitioners to administer the relief to give value to Plaintiffs' right, assuming their contractual rights were vindicated. *Hunt*, 432 U.S. at 347 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936); *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 126 (1915); *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 336 (1907)); Armistead M. Dobie, *Jurisdictional Amount in the United States District Court*, 38 HARV. L. REV. 733, 734 (1925) (suggesting that the amount-in-controversy is "always" determined by the "value to the plaintiff of the right" that plaintiff seeks to protect).[16] To the extent that the Ninth Circuit's opinion takes a different approach from the above well-established precedent of this Court, Respondents respectfully disagree with the panel's rationale.

If the object of this litigation were not clear from the face of the complaint, it becomes abundantly clear from the realization that were Petitioners to give each putative class

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16. Several courts of appeal agree with Judge Dobie, at least in the context of multi-plaintiff cases or class actions. *See, e.g., Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993); *Alfonso v. Hillsborough County Aviation Auth.*, 308 F.2d 724, 726-27 (5th Cir. 1962); *Massachusetts State Pharm. Asso. v. Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970); *Snow*, 561 F.2d at 790 (9th Cir. 1977); *Lonnquist*, 421 F.2d at 599 (10th Cir. 1970); *Ericsson GE Mobile Communs. v. Motorola Communs. & Elecs.*, 120 F.3d 216, 219-20 (11th Cir. 1997); *but see Brand Name*, 123 F.3d at 609-10 (7th Cir.); *Justice v. Atchison, T. & S.F.R. Co.*, 927 F.2d 503, 505 (10th Cir. 1991).

member $3,500 toward the purchase or lease of their next qualifying Ford vehicle, the "controversy" relevant to the injunction sought would disappear. In *Russell v. Stansell*, 105 U.S. 303 (1882), appellants petitioned the district court to enjoin Stansell from collecting on an assessment worth more than $70,000 decreed against the Levee Board of Mississippi. The plaintiffs in the case became involved because the Levee Board did not satisfy the decree, and under the provisions of the statute creating the Levee Board, Stansell could obtain an assessment and collection of the charge from the owner of the lands in the district, which Stansell had done. Despite the fact that the plaintiffs sought to enjoin Stansell from collecting an amount more than the requisite amount-in-controversy, this Court held that jurisdiction was lacking. *Id.* at 304. In doing so, this Court stated that the "*object* was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable. An injunction, if granted, would necessarily be to prevent [Stansell] from collecting from each owner the amount for which he was separately liable." *Id.* (emphasis added). This Court then held that the plaintiffs' interests were "distinct and separate" and thus could not be "united" or aggregated "for the purpose of making up the amount necessary to give us jurisdiction on appeal" even though the injunction sought, if granted, would cost Stansell more than the requisite amount-in-controversy. *Id.*

This case presents the converse to *Russell*. Instead of seeking an injunction to prevent someone from collecting what they separately owe, the *object* of the injunction sought is to force the Petitioners to pay each plaintiff what they are separately owed under their individual contracts. And, Petitioners can relieve themselves of further liability by paying to each what they owe. In other words, the nature of the right Plaintiffs seek to protect through the equitable relief requested is merely the "means through which the individual claims may be satisfied." J.A. 117. This is the object of the litigation.

Moreover, for Plaintiffs to establish their right to their individual rebate amounts, it does not matter that Citibank would incur administrative costs in excess of $75,000; those costs are simply a collateral effect of the litigation. *Ross v. Prentiss*, 44 U.S. (3 How.) 771, 772 (1844) (holding jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain, but upon the amount in dispute between them); *Elliott*, 4 F.2d at 501 (same). Indeed, no testimony about the administrative costs would be taken to establish and protect the rights at issue. *Cf. Smith v. Adams*, *supra*. In *Ross v. Prentiss*, land worth more, and mortgaged for more than $2,000, was about to be sold on execution for a debt of a lesser sum, and a complaint by the mortgagee to stay the sale was dismissed. The mortgagee appealed, and insisted that jurisdiction depended on the value of the property, and that he might lose the whole right of his mortgage by a forced sale. In rejecting these arguments and dismissing the appeal, this Court stated:

> The only matter in controversy between the parties is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not. *The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him*, but upon the amount in dispute between them; and as that amount is in this case below two thousand dollars, the appeal must be dismissed.

Ross, 44 U.S. at 772 (emphasis added).

Similarly, here, the relevant controversy is whether the Petitioners breached the individual's contract when they unilaterally terminated the Rebate Program. The amount-in-

controversy is the damage, if any, each plaintiff suffered as a result of the contractual breach, not the administrative costs of the Rebate Program, which is collateral to the value of the contractual right.[17] And, the value of the contractual right undisputedly is less than $75,000 each.

B. Historically, the Plaintiff's Viewpoint or Objective Has Been Determinative in Valuing the "Object of the Litigation" and the Amount-In-Controversy.

If the Court were to agree with Petitioners that their costs are the "object of the litigation" and specifically endorse equating the defendant's costs with the test for determining jurisdiction, the Court would be uprooting over a 100 years of settled jurisprudence and fundamental principles that Congress has relied upon in setting the amount-in-controversy threshold only to expand federal jurisdiction needlessly. *Snyder*, 394 U.S. at 338-42. To be sure, valuing the "object of the litigation" has caused courts problems over the years. This confusion has lead lower courts to create the so-called "either viewpoint" rule. However, this Court has consistently valued the "object of the litigation" from the plaintiff's viewpoint, in large measure because jurisdiction is tested on the face of the complaint. Indeed, this Court has expressly stated on several occasions that the jurisdictional amount is to be tested "by the value of the object to be gained by complainant." *See, e.g., Glenwood Light & Water Co.*, 239 U.S. at 125. The Court should reaffirm this principle and provide the lower courts with clear guidance explaining

17. To see just how collateral these administrative costs are, consider the fact that although Citibank will incur administrative costs in excess of $75,000, according to the allegations in the complaint, Citibank will actually *profit* financially if the Rebate Program were reinstated. J.A. 54. The Rebate Program was discontinued because of Ford's contingent liability for the outstanding rebates. J.A. 54-55. It is the money that Ford will pay to Plaintiffs in redeeming the rebates that are in controversy.

that plaintiffs are the master of the complaint and jurisdiction, and thus it is their perspective that is paramount.

1. Plaintiff's viewpoint determines the value assigned to the "object of the litigation."

Because jurisdiction is determined from and contingent upon the allegations in the complaint, it is natural to assess the value of the "object of the litigation" or right sought to be enforced from the plaintiff's perspective as well. Indeed, this Court has declared this the rule.

In *Glenwood Light & Water Co.*, for example, this Court stated "the jurisdictional amount is to be tested by *the value of the object to be gained by complainant*." *Id.* at 125 (emphasis added). What is of additional significance though is that this Court specifically rejected the notion that jurisdiction could be established by the cost to the defendant. In *Glenwood Light* the plaintiff sought to enjoin the defendant from erecting telephone poles and wires that were causing injury to the plaintiff's poles, wires, and business. The district court had held "that the jurisdictional amount was *fixed by the cost to defendant* of removing its poles and wires in the streets and alleys where they conflicted or interfered with the poles and wires of complainant, and replacing defendant's poles and wires in such position as to avoid conflict and interference." *Id.* (emphasis added). That amount, as fixed by the cost to the defendant, was less than the requisite amount-in-controversy and the case was dismissed. On appeal, this Court expressly held that it was erroneous to test the jurisdictional amount by the cost to the defendant. Instead, "the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, *viz.*, that the jurisdictional amount is to be tested by *the value of the object to be gained by complainant*." *Id.* (emphasis added). And, because the plaintiff sued to "maintain and

operate its plant and conduct its business free from wrongful interference by defendant," it was the value that *the remedy would bring to the plaintiff* that was "determinative of the jurisdiction." *Id.* at 126.

Similarly, in *Hunt v. New York Cotton Exchange*, 205 U.S. 322 (1907), plaintiff Exchange brought suit to enjoin the defendant from receiving, using, or selling quotations of the Exchange without its consent or approval. The defendant contended that the amount-in-controversy requirement was not met because what plaintiff sought to enjoin was his contract with a telegraph company from whom he received quotations, and that contract was less than jurisdictional prerequisite. In response, this Court first noted that plaintiff's injury, and the reason or "object" of the lawsuit, was not the fee paid by Hunt under contract to the telegraph company, but instead was

> to enjoin the appellant from receiving, using or selling, directly or indirectly, the Exchange's quotations or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them either by contract of purchase from the Exchange, or with its consent and approval, from one of the Telegraph Companies authorized to distribute them.

Id. at 336. This Court continued, stating:

> And the right to the quotations was declared, as we said in *Board of Trade* v. *Christie Grain & Stock Company*, to be property, and the Exchange may keep them to itself or communicate them to others. *The object of this suit is to protect that*

> *right. The right, therefore, is the matter in dispute, and its value to the Exchange determines the jurisdiction*, not the rate paid by appellant to the Telegraph Company.

Id. (emphasis added).

Bitterman v. Louisville & Nashville R.R. Co., 207 U.S. 205 (1907), is yet another case where this Court expressly held that the jurisdictional amount is determined from the plaintiff's perspective. In *Bitterman*, the railroad sought to enjoin ticket brokers from dealing non-transferable tickets at reduced rates. In response to a jurisdictional challenge, this Court stated:

> [T]he substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but *by the value of the* business to be protected and the *rights of property which the complainant sought to have recognized* and enforced.

Id. at 225 (emphasis added); *see also Thomson v. Gaskill*, 315 U.S. at 446-47 (valuing the amount-in-controversy in suit seeking and injunction and damages from the face of the complaint and solely from the "pecuniary consequence" to plaintiffs); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 587-89 (1939) (refusing to value the amount-in-controversy from the defendants' perspective in a case seeking injunctive relief of a tax statute despite, if enjoined, the direct pecuniary deprivation to defendant California would have exceeded the jurisdictional threshold); *Scott v. Frazier*, 253 U.S. 243, 244 (1920) ("It is well settled that . . . amount in controversy must equal the jurisdictional sum as to each complainant."); *Berryman v. Board of Trustees*, 222 U.S. 334, 345-46 (1912)

(valuing the amount in controversy, in a suit to enjoin the collection of a tax against plaintiff on the ground that it was perpetually exempt from taxation by contract, in accordance with the value of the right plaintiff sought to protect); *McNeil v. Southern R. Co.*, 202 U.S. 543, 558 (1906) (valuing rights sought to be enforced in the action from the plaintiff's perspective); *Wheless v. St. Louis*, 180 U.S. 379, 382 (1901) (valuing an injunction and stating:

> The 'matter in dispute' within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied, or which may be levied, *as against each of the complainants separately*. The rules of law which might subject complainants to or relieve them from assessment would be applicable alike to all, but each would be so subjected, or relieved, in a certain sum, and not in the whole amount of the assessment.

Gibson v. Shufeldt, 122 U.S. 27, 39 (1887) ("The sole matter in dispute . . . is between the defendants and each plaintiff as to the amount which the latter shall recover"); *see generally* C. T. Drechsler, *Criterion of Jurisdictional Amount to Vest Jurisdiction of Federal Court Where Injunction Is Sought*, 30 A.L.R.2d 602 (1954 & Supp. 2002).

Despite this Court's pronouncement of such a clear rule that the "amount in controversy must equal the jurisdictional sum as to each complainant," *Scott v. Frazier*, *supra*, Plaintiffs acknowledge that this Court has not always seemingly determined the value of the "object of the litigation" from the "plaintiff's viewpoint", though it has always valued the objective from the rights plaintiffs put

at issue and the allegations contained in the complaint. *See, e.g., Mississippi & Missouri Railroad Co. v. Ward*, 67 U.S. (2 Black) 485, 492 (1863); *Market Co. v. Hoffman*, 101 U.S. (11 Otto) 112, 113 (1879). Petitioners latch onto these two cases to support their contention that "either viewpoint" rule controls federal jurisdiction under the diversity statute whenever plaintiffs' seek an injunction. However, these cases are not contrary to the well-settled rule that it is the plaintiff's complaint and the plaintiff's "object of the litigation" that is controlling.

First, *Market Co. v. Hoffman*, is inapposite. As this Court has noted, it is a case involving several plaintiffs with a common and undivided interest and thus the value of the litigation was the aggregate amount at stake by the sale of the market stalls. *See Gibson*, 122 U.S. at 34 (grouping *Market Co.* with *Shields v. Thomas*, 58 U.S. (17 How.) 3 (1855), and *Freeman v. Dawson*, 110 U.S. 264 (1884)). In *Market Co.*, 206 complainants, all occupiers of the stalls in the market, sued jointly to enjoin (and did enjoin) the market company from selling the stalls for more than $60,000. On appeal, this Court stated, "the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable." *Market Co.*, 101 U.S. at 113. Furthermore, the purpose of the lawsuit was to enjoin the sale. Thus, the "object of the litigation," from the plaintiff's perspective also happened to be the cost to the defendant.

Mississippi & Missouri Railroad Co. v. Ward, however, is a little more problematic, though it too is reconcilable with the "plaintiff's viewpoint" rule. Suing as a "public prosecutor," the plaintiff in *Ward* sought to abate a public nuisance. In particular, the plaintiff sought removal of the

Rock Island Bridge, which spanned the Mississippi river, on the theory that the bridge was an obstruction to navigation and amounted to a public nuisance. No damages were asked. This Court noted, in sustaining jurisdiction, "[b]ut the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." 67 U.S. at 492. Courts and commentators have interpreted this statement as proof that the "defendant's viewpoint" can be considered in valuing the amount-in-controversy. *See*, *e.g.*, Dobie, *supra*, at 740. However, this Court's decision in *Ward* is consistent with the "plaintiff's viewpoint" rule even though the amount-in-controversy was measured by the cost to remove the bridge. Indeed, properly understood, *Ward* is yet another case where the "object of the litigation" is determined by the complaint and plaintiff's viewpoint, and valued in accordance with what the plaintiff sought to accomplish or obtain through the litigation (i.e., the removal of the bridge). Thus, in *Ward* and *Market Co.*, and like many other cases, the value of the litigation to the plaintiff was identical to the cost to the defendant. *See* Pet. Br. at 10 ("the recovery sought by the plaintiff usually equals the liability faced by the defendant" and citing authorities).

Accordingly, because this Court has historically valued the "object of the litigation" solely from the plaintiff's viewpoint, and because Congress has relied on this Court's precedent in establishing the requisite amount-in-controversy, the Court should reject Petitioners' invitation to adopt the "either viewpoint" rule when determining how to value the "object of the litigation" and explicitly reaffirm that the plaintiff's viewpoint is the only viewpoint relevant to the calculus.

2. The "paramount policy" of this Court is that plaintiff's complaint controls jurisdiction.

Expressly adopting a plaintiff viewpoint rule is consistent with the "paramount policy" of this Court that "the plaintiff is the master of the complaint,"[18] and the general rule governing dismissal for want of jurisdiction in cases brought in federal court is that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Saint Paul*, 303 U.S. at 288. Furthermore, taking the plaintiff's viewpoint and objective is consistent with the well-pleaded complaint rule[19] and the removal statute as "the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lose his right to remove." *Id.* at 291.[20] In fact, if on the face of the complaint, it is obvious to a court that a suit cannot involve the necessary amount, dismissal of the federal action is required. *Id.*[21] Accordingly, the Court should reaffirm the bright line test that the plaintiff's viewpoint determines jurisdiction.

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18. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987); *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) (Holmes, J.).

19. This Court has long held that "the presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. at 392).

20. A defendant may remove a case only if the claim could have been brought in federal court. 28 U.S.C. § 1441(b). "Jurisdiction may not be sustained on a theory that the *plaintiff* has not advanced." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986) (emphasis added).

21. Certain *amici* suggest that so much emphasis on the plaintiff's perspective might unfairly prejudice defendants. Abiding

(Cont'd)

Such "bright line" principles are basic to plaintiffs' long-established rights to decide "what jurisdiction [they] will appeal to," *Sea Gull*, 237 U.S. at 480, and "what law [they] will rely upon." *Merrell Dow*, 478 U.S. at 810 n.6. If a defendant, by merely recasting the complaint or adding allegations about the cost of the injunctive relief requested could defeat a plaintiff's choice of law or forum, then, in the words of this Court, "the plaintiff would be master of nothing." *Caterpillar*, 482 U.S. at 399; *see also Great Northern R. Co. v. Alexander*, 246 U.S. 276, 281 (1918) (jurisdiction is "to be determined by the allegations of the complaint . . . it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant"). This is especially true in a case such as this one against two behemoth corporations that do business in all 50 states and across the globe, where any injunctive relief requested would realistically cost them in excess of $75,000 in administrative compliance costs regardless of the number of plaintiffs. *Brand Name*, 123 F.3d at 610 (noting "every case, however trivial, against a large company would cross the threshold, whether the threshold was $50,000 or as it now is $75,000, even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number").

(Cont'd)
by strict adherence to the complaint and the plaintiffs' objective in the litigation does not unfairly prejudice defendants. In most litigation a defendant can choose to become the plaintiff in the same controversy by invoking the Declaratory Judgment Act or a state's analog, choose the jurisdiction that they wish to be in, and the law that they wish to apply. In this case, had defendants attempted to take such an approach, they would have sought an order validating their alleged right to terminate the individual agreements between them and the putative class members and avoid payment of the rebates Plaintiffs allege they are owed. The "controversy" would remain the same, and the same amount of money would be at issue.

C. The Doctrine of *Stare Decisis* Militates Against Adopting the "Either Viewpoint" Rule.

As this Court has stated, *stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

Petitioners' request that the Court adopt the "either viewpoint" rule threatens to undermine, if not overrule, this Court's precedent interpreting the unambiguous provisions of the diversity statute. In short, Petitioners request that the Court value the "object of the litigation" differently than this Court has ever done. As discussed above, the relevant decisions of this Court have stood for decades and, more importantly, are the products of over 100 years of this Court's jurisprudence. These decisions also include the non-aggregation principle discussed below, which is equally impacted by Petitioners' request.

Other than increasing the amount-in-controversy threshold to establishing federal jurisdiction, the relevant text of the diversity statute and the scope of federal diversity jurisdiction have remained essentially unchanged by Congress since the statute was originally enacted. It is settled that "[t]he policy of the [diversity] statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction

to the precise limits which the statute has defined." *Healy*, 292 U.S. at 270; *Snyder*, 394 U.S. at 339-40. Indeed, Congress has understood the purpose of amount-in-controversy requirement as to preserve the proper role of state courts and to avoid the overburdening of federal courts. *See* Baker, *supra*, 102 F.R.D. at 302-18. Thus, without Congress acting to amend the diversity statute to adopt the "either viewpoint" rule or amend the non-aggregation principle, it would be inappropriate for this Court to revisit the holdings to expand federal jurisdiction where "Congress, with complete understanding of how the courts had construed the statute," has chosen not to. *Zahn*, 414 U.S. at 300-01; *Snyder*, 394 U.S. at 339-42.[22]

Admittedly, there may be valid policy reasons to consider the defendant's viewpoint in valuing the "object of the litigation" and Petitioners and *amici* more than adequately provide the Court with this discussion (*e.g.*, ensuring that the case is substantial, and help protect from bias, though it is fair to wonder just how biased Petitioners would be in any state as they do business in every state). However, this Court should not pronounce a new rule reinterpreting how to value the "object of the litigation" when that procedure has been long settled. *E.g.*, *Scott v. Frazier*, 253 U.S. at 244 ("It is well settled . . . amount in controversy must equal the jurisdictional sum as to each complainant.").

22. In fact, any change purporting to alter the definition of the "amount in controversy" would conflict with the command of Rule 82. *Snyder*, 394 U.S. at 337-38. The cases discussed in this brief for the most part predate the 1958 amendment to the diversity statute. Thus, Petitioners' discussion in note 4 of their brief is simply irrelevant as Congress is presumed to know the Court's interpretation of the statute, and when essentially left unchanged for over one hundred years, Congress is deemed to have ratified the Court's interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Furthermore, the Court should be leery of adopting Petitioners' request because that would open the federal courts to the hundreds, if not thousands, of state court actions filed across the country annually that pray for injunctive relief, especially when this Court has expressed its concern over the caseloads in federal court. *See* 1999 Year-End Report on the Federal Judiciary.[23] Indeed, the U.S. Department of Justice expressed its concern to Congress about the impact that the Class Action Fairness Act of 2000 would have had on the federal courts, stating: it "would flood the Federal courts with class action suits at a time when the Chief Justice, among others, has reportedly expressed serious concerns about the increasingly burdensome workload of the Federal court." Letter from Robert Raben, Asst. Attorney General, to Sen. Leahy, dated June 9, 2000, at 3, available at *www.citizen.org/documents/ACF219.PDF*. If the provisions of the Class Action Fairness Act caused the U.S. Department of Justice to note the "flood" of additional lawsuits the federal courts would be asked to hear, Petitioners' request to adopt the untethered "either viewpoint" rule would result in an absolute deluge of additional cases. If Congress chooses to, it can and should amend section 1332 to incorporate defendant's viewpoint. *See*, *e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.") However, this Court's precedent simply forecloses an interpretation of the "object of the litigation" that incorporates the defendant's viewpoint in valuing the amount-in-controversy. *See supra*.

Another reason that this Court should await Congressional action is that Congress is best suited to making the policy decisions implicated. For example, Congress should determine where to draw the line as to the "due regard" to be given to state

23. In 2001, the filings in the federal courts of appeal reached an all-time high at 57,464. Civil filings in 2001 were also substantial, totaling 258,517. 2001 Year-End Report on the Federal Judiciary.

governments and their courts. *See Shamrock Oil*, *Healy*, *supra*. Indeed, the Court should decline to adopt Petitioners' expansive interpretation of the diversity statute because it would invariably result in the "unnecessary federalization of traditional state court matters" at a time when the federal courts are burdened heavily already. 1999 Year-End Report on the Federal Judiciary (quoting Chief Justice Rehnquist).

Petitioners should take some solace from the fact that Congress may give them what they ask of this Court. Pending before Congress are S. 1712 and H.R. 2341 (the "Class Action Fairness Act of 2001").[24] These bills seek to amend 28 U.S.C. § 1332 to federalize class actions and modify the amount-in-controversy requirements. In fact, since at least 1998, Congress has been attempting to amend the diversity statute as applied to class actions because several legislators perceive, just as Petitioners do, the need to amend the diversity statute to undo the effect of this Court's holdings interpreting the amount-in-controversy provision and the non-aggregation principle so recently reaffirmed in *Snyder* and *Zahn*.[25] If enacted, the Class Action Fairness Act would establish the new rules of federal jurisdiction in class actions that Petitioners ask this Court to write but at a different *and higher* threshold, well above the present $75,000.[26]

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24. The fact that the Class Action Fairness Act is pending before Congress implicitly acknowledges that a case such as this one, where plaintiffs' state law claims are separate and distinct, cannot be aggregated or otherwise brought in federal court on the basis of diversity jurisdiction or through removal.

25. A similar bill, each one entitled "Class Action Fairness Act of [Year]", has been introduced in the House and Senate every year since 1998.

26. In relevant part, the Act would modify section 1332 to read:

> (d)(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy

(Cont'd)

In sum, because this Court has historically valued the "object of the litigation" from the plaintiff's viewpoint and has historically declared that to be the rule, this Court should not uproot its long-settled interpretation of the amount-in-controversy requirement to view the "object of the litigation" from the defendant's viewpoint. Instead, this Court should reaffirm its prior holdings and state clearly that the plaintiff's viewpoint controls the "object of the litigation," and defer to Congress the determination of whether diversity jurisdiction should be expanded.[27]

(Cont'd)

> exceeds the sum or value of $2,000,000, exclusive of interest and costs, and is a class action in which —
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> . . .
>
> (d)(4) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $2,000,000, exclusive of interests and costs.

Resp. App. at 16a-17a; 38a-39a.

The Act would also amend the removal statute to include a provision to make most orders remanding a class action to state court immediately appealable.

27. If the Court concludes that the "object of the litigation" here, *viewed solely from the plaintiff's perspective*, is merely the reinstitution of the Rebate Program in the *abstract*, including all of the attendant costs, and not Plaintiffs' subsequent use and monetary entitlements under the program which alone bring value to Plaintiffs' contractual rights, Plaintiffs concede that the amount-in-controversy

(Cont'd)

III. The "Object Of The Litigation" Here Cannot Exceed The Requisite Amount-In-Controversy Without Violating The Non-Aggregation Principle Applicable To Class Actions

The primary object of this litigation, as is uncontested, is for Plaintiffs to receive the benefit of the bargain of the Rebate Program that Ford and Citibank unlawfully terminated. That is, Plaintiffs seek the opportunity to accrue rebates and spend them on the purchase or lease of qualifying Ford vehicles, *viz.*, it is to *collect and use* their rebates. That right was valued at $3,500 — at most — for any one plaintiff. J.A. 95, 113. Thus, because the "object of the litigation" was valued at no more than $3,500 per plaintiff, in accordance with non-aggregation principle applicable to class actions, this case does not meet the jurisdictional threshold on the facts. To find jurisdiction under the diversity statute under these facts would require this Court to overrule *Snyder* and *Zahn* and over 100 years of precedent.

A. The Non-Aggregation Principle and Its Strict Application.

According to the traditional interpretation of the diversity statute, the non-aggregation principle holds that the "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." The only time aggregation is permitted in multi-plaintiff cases is where "two or more plaintiffs unite *to enforce a single title or right in which they have a common and undivided interest*." *Snyder*, 394 U.S. at 335 (emphasis

(Cont'd)
requirement is satisfied. However, Plaintiffs' allege that the "object of the litigation" is more than the reinstatement of the program in the abstract, as it is only the *use* of the program and redemption of the rebates that brings value to Plaintiffs' rights.

added); *see also Zahn*, 414 U.S. at 295-96 (same); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-89 (1939) (same); *Wheless*, 180 U.S. at 382 (same); *Clay v. Field*, 138 U.S. 464, 479 (1891) (same); *Russell v. Stansell*, 105 U.S. at 304 (same); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 145-47 (1832) (same). The non-aggregation principle equally applies in multi-defendant cases. *Walter v. Northeastern R. Co.*, 147 U.S. 370, 373-74 (1893). Thus, no plaintiff or defendant may enter federal court by "rid[ing] on another's coattails." *Zahn*, 414 U.S. at 301.

The non-aggregation principle is applied strictly.

> Indeed, so strictly has it been applied, that, in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum, belonging to distinct parties, and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied.

Elgin v. Marshall, 106 U.S. (16 Otto.) 578, 582 (1882). The strict construction is demanded even where plaintiffs allege a "common and undivided" interest. *See, e.g., Thomson*, 315 U.S. at 446 (dismissing for want of jurisdiction where the record failed to contain the contracts upon which plaintiffs' allegedly "common and undivided" claims were brought).

B. Plaintiffs' Claims Are Separate and Distinct; the Claims Cannot Be Aggregated.

Petitioners concede that plaintiffs' claims are separate and distinct. J.A. 113, 117. Thus, plaintiffs have no *single title or right* in which they share a common and undivided

interest. However, Petitioners contends that the relief sought, in particular reinstitution of the Rebate Program, is common and undivided and thus its value to Plaintiffs may be aggregated to meet the jurisdictional threshold even while conceding that plaintiffs do not have a united title or right to the relief requested. Pet. Br. at 26-31. Petitioners misapprehend the non-aggregation principle.

By its very terms, the non-aggregation principle only applies to claims, i.e., the "*single titles or rights*" in which the parties share a common and undivided interest that one or more plaintiffs seek to protect. It does not apply to the relief requested, no matter how "common and undivided" that interest may be. *Snyder*, 394 U.S. at 336-37; *Clark*, 306 U.S. at 588; *Saint Paul*, 303 U.S. at 294 ("[t]he claim, whether well or ill founded in fact, fixes the right of the defendant to remove"); *Gibson*, 122 U.S. at 30 ("the test is whether they claim it under *one common right* . . . or claim it under separate and distinct rights") (emphasis added); *Oliver*, 31 U.S. at 146 ("If the cause of action is several, the suit must be several also."); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1264 (11th Cir. 2000) ("For amount in controversy purposes, however, it is the nature of the right asserted, not that of the relief requested, that determines whether the claims of multiple plaintiffs may be aggregated"); *Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977-78 (7th Cir. 2000) (noting that remedy sought, seeking imposition of constructive trust, does not convert claims of putative class members entitled to their own separate recovery into common and undivided interest); *Gilman v. BHC Sec.*, 104 F.3d 1418, 1422-24 (2d Cir. 1997) (discussing the non-aggregation principle and focusing on the rights to be protected); *Snow*, 561 F.2d at 790 (9th Cir.) ("the proper focus . . . is not influenced by the type of relief requested, but rather continues to depend upon the nature and value of the right asserted,"

(i.e., the object of the litigation)); *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992, 993-94 (5th Cir. 1967) (holding class conversion and contract claims are separate and distinct even though relief sought was class-wide and not individual).

Here, it is uncontested that Plaintiffs' claims and causes of action are separate and distinct. J.A. 113, 117. Indeed, the contracts at issue do not grant any plaintiff any interest, title, or right in any other plaintiff's contract. Moreover, because Plaintiffs' *claims* are separate and distinct, each class member will be owed a separate rebate amount and damages, assuming that the lawsuit is successful.[28] Accordingly, aggregating Plaintiffs' *claims* would violate the non-aggregation principle.

Additionally, the district found that "[t]he injunctive relief sought . . . is simply a means to vindicate each plaintiff's separate and individual claim for accrual of rebates for five years." J.A. 96. Consequently, if the Court were to accept Petitioners' argument that simply by virtue of including a request for injunctive relief, separate and distinct claims, which cannot be aggregated to obtain federal jurisdiction, could suddenly be bootstrapped into federal court. This result would "undermine the principles of *Snyder* and *Zahn*." J.A. 96-97. Thus, because the separate value of the lawsuit to each plaintiff is less than $75,000, this case

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28. Petitioners suggest that they have no interest in how the damages of this suit are apportioned or what rebates are owed to each plaintiff and class member. Pet. Br. at 27-28. This contention seems incongruous with the purpose of the lawsuit, which is to enforce the contractual right to the rebate and give each class member his or her separate opportunity to cash this right in on the purchase or lease of a qualifying Ford vehicle. *See supra.* And, as Petitioners acknowledge, the value of this right is dependant on cardholder usage. Pet. Br. at 28; *see also* J.A. 53-54, 87-88.

cannot meet the requirements for jurisdiction without running afoul of the non-aggregation principle.

Even under the "either viewpoint" rule, obtaining federal jurisdiction in this case requires aggregation. Although Petitioners contend that the business cost of reinstating the Rebate Program, even for one plaintiff, exceeds the $75,000 threshold, the district court found that Petitioners failed to prove this jurisdictional fact. J.A. 97. The district court did so for a good, but albeit, unstated reason: the evidence in the record simply fails to support Petitioners. Because there are multiple defendants, neither defendant can ride the coattails of the other to assert federal jurisdiction. Here, even if the Court were to conclude that the "object of the litigation" is more than $75,000 per plaintiff, the evidence in the record[29] about the costs of administering the Rebate Program fails to prove that Ford would incur costs or liabilities more than $75,000 per plaintiff. In fact, not only have Petitioners failed to include a copy of the Ford-Citibank contract which might permit a court to determine if they have a "common and undivided" interest in the Rebate Program, *see Thomson*, 315 U.S. at 446, but they have also submitted evidence that the costs of the program are not shared equally. Indeed, according to the record, Citibank shoulders the administrative costs of the program while Ford provides the rebate credits, J.A. 87-88, which can be no more than $3,500 per plaintiff. J.A. 95, 113. Thus, even accepting Petitioners' argument that the costs of implementing Rebate Program count toward valuing the amount-in-controversy, this case would run afoul of the non-aggregation principle because the costs to Ford must be aggregated to exceed the jurisdictional threshold. Stated otherwise, even if the defendant's viewpoint is considered and jurisdiction is tested by "the cost to each defendant of

29. The Court is limited to the record in assessing whether the jurisdictional amount is sufficient. *Thomson*, 315 U.S. at 446.

an injunction running in favor of one plaintiff,"[30] finding jurisdiction here violates the non-aggregation principle because the cost to Ford is at most $3,500 per plaintiff. Accordingly, the district court's finding that Petitioners failed to meet their burden under the "either viewpoint" rule should be upheld. J.A. 97.

C. The "Either Viewpoint" Rule Does Not Provide an Exception to the Non-Aggregation Principle.

Every court expressly adopting the "either viewpoint" rule has held that it is limited by the non-aggregation principle articulated in *Snyder* and *Zahn*. *See, e.g.*, *Brand Name*, 123 F.3d at 609-10. Thus, every court must value the "object of the litigation" without aggregating "separate and distinct" claims. Petitioners' request that this Court recognize administrative compliance costs as part of the value of the "object of the litigation" is tantamount to rewriting the non-aggregation principle to include an exception that would swallow the rule. Respectfully, such costs should simply be deemed collateral to the "object of the litigation" and thus irrelevant to the jurisdictional calculation. *See Ross*, *supra*. Alternatively, this Court should uphold the Ninth Circuit's ruling that such costs are, as a matter of law, excluded from the amount-in-controversy as this will adhere to the purpose of the non-aggregation principle and limit federal jurisdiction.

No court under any approach has accepted the argument that ministerial or administrative business costs of compliance with an injunction satisfy the amount-in-controversy requirement. Just like the panel below, in *Brand Name*, Judge Posner specifically emphasized that if such an argument were accepted, "then every case, however trivial, against a large company would cross the threshold." 123 F.3d at 610. For example, although Petitioners contend otherwise,

30. *Brand Name*, 123 F.3d at 610.

see Pet. Br. at 23, *Snow v. Ford* would be removable under the rule Petitioners ask this Court to adopt. *Snow v. Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977).

In *Snow*, the plaintiff filed suit in state court seeking damages and an injunction against Ford from continuing to sell trailering special packages without a wiring connector kit. Like the present case, Ford removed and argued that the requisite amount-in-controversy was met because of the business right Snow sought to enjoin, as it would affect all of Ford's future sales and impose substantial costs on Ford. *Id.* at 790. The court disagreed, as the injury Ford allegedly caused each plaintiff and putative class member was $11. According to the court, this was the nature and value of the right asserted, it was not the administrative business expenses Ford would incur. *Id.* However, including the administrative costs that a business would incur in complying with an injunction when making the amount-in-controversy determination, including those in *Snow*, would easily bring such cases into federal court. Indeed, simply the cost of duplicating and disseminating such an order within a large corporation alone might exceed the jurisdictional threshold. *See Brand Name*, 123 F.3d at 610.

If Petitioners' request to include these administrative costs in valuing the "object of the litigation" were adopted in full, the kinds of cases suddenly capable of being brought in federal court would not simply be limited to multi-party cases either. Indeed, if such administrative compliance costs were considered, there would be nothing to stop large corporate defendants from removing every diversity case seeking an injunction to federal court, and thereby render plaintiffs "master of nothing." *Caterpillar*, 482 U.S. at 399. Nor would there be anything to stop plaintiffs from accessing the federal courts if all any diverse plaintiff had to do was pray for injunctive relief. *Snow*, 561 F.2d at 791. In short, adoption of the "either viewpoint" rule would blow the federal courthouse doors wide open. Thus, even

if the Court accepts Petitioners' argument that defendants' viewpoint matters in valuing the amount-in-controversy, this Court should uphold the panel's ruling that administrative compliance costs of the nature involved here, as a matter of law, cannot be included in the jurisdictional calculus.

Fundamentally, there is little reason to include these kinds of compliance costs in any event. These business costs are simply not the kind of business costs that courts would consider even under the "either viewpoint" approach. Pre-litigation, the Petitioners had the Rebate Program in place, the business apparatus had been designed, employees had been hired, and the Rebate Program was operational. The injunction requested, at the time the suit was filed, was simply to keep the business practice going as a means to compensate Plaintiffs for the damages suffered. J.A. 95-96. It was not as though the injunction requested Ford or Citibank to design a new program or create a new product and thus substantially alter their business practices. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 718-19 (D. Md. 2001) (noting the value of the litigation (i.e., creating a Windows operating system untied from the Internet Explorer) would cost more than $58 million to create). Instead, the injunction requested would simply have maintained the business practice that Petitioners established until each plaintiff had been paid up to $3,500 in value, which is exactly what Plaintiffs bargained for in signing up for the co-branded credit card.

In sum, adoption of the "either viewpoint" rule would open the courthouse doors to every large corporation whenever any diverse plaintiff (or plaintiffs) sues them and seeks injunctive relief. Moreover, it would permit any diverse plaintiff to assert federal against a large corporation jurisdiction simply by including a prayer for injunctive relief. The "either viewpoint" rule thus subverts the non-aggregation

principle entirely. Moreover, as emphasized already, expansions of federal jurisdiction are not the province of this Court; they are Congress's responsibility. And, adoption of the "either viewpoint" rule would expand diversity jurisdiction in a manner inconsistent with the settled interpretations and policies of the diversity statute and *Snyder* and *Zahn*. Accordingly, the Court should reject Petitioners' invitation.[31]

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31. Plaintiffs would be remiss if they ignored several of the *amici*'s contention that state courts are somehow beholden to plaintiff's lawyers or incapable of handling class actions. The state court judges who are elected are beholden to the electorate, as is any elected official. Over the years they have proven exceptionally capable jurists. And, though some state courts may have fewer resources at their disposal than the federal courts, this fact does not equate with a lesser form of justice. State courts seek to do justice and work diligently at it. Moreover, both state and federal judges are capable of committing errors with the resources they have.

CONCLUSION

For the reasons explained above, the judgment should be affirmed.

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Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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IN THE

Supreme Court of the United States

No. 01-896

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The diversity statute establishes federal jurisdiction in all civil actions involving diverse parties where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). Respondents would read the statute as if it said "sum or value *to the plaintiff*," which it plainly does not. In cases construing the statute, this Court has stated that "the amount in controversy is measured by the value of the object of the litigation." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). Respondents would read those cases as if they said "value *to the plaintiff* of the object of the litigation," which they plainly do not. Other cases construing the statute have stated that a plaintiff *cannot*

create jurisdiction through joinder of monetarily insufficient individual claims. Respondents would read those cases as if they said that a plaintiff *can eliminate* jurisdiction through joinder of monetarily *sufficient* individual claims, which they plainly do not.

Our opening brief established that the "either viewpoint" rule for evaluating the amount of the object in controversy is authorized by the diversity statute, acknowledged by this Court's cases, and compelled by sound policy. When viewed from the petitioners' perspective, the value of the injunction requested in this case—that is, the fixed costs of reinstating the Rebate Program—well exceeds $75,000, whether measured on the basis of each individual plaintiff's claim, or as a common and undivided classwide demand.

In short, this case is no different from a public nuisance case—for example, where ten farmers, each of whom suffers $1000 in crop losses from a neighboring chemical manufacturing facility worth millions of dollars, sue to enjoin operation of the facility. In that example, the matter in controversy—the continued operation of a multimillion-dollar manufacturing facility—exceeds $75,000, even though each plaintiff farmer's stake in the controversy is worth a smaller amount. So it is here, except that respondents seek to compel the reinstatement of a business practice, rather than to abate it as a nuisance.

Rather than address the jurisdictional implications of the relief they affirmatively seek, respondents labor to recast their action altogether. Contrary to the plain terms of their own Consolidated Complaint, they now contend that the "object of the litigation" is *not* actually the reinstatement of the Rebate Program, but rather payment to each individual plaintiff of the monetary value of the rebates he or she assertedly could have accrued and redeemed had the Program continued. Because the value of *that* purported right, they contend, does not exceed $3500 per plaintiff, the jurisdictional threshold is not satisfied.

This effort at avoidance is unavailing. Respondents' elected to request damages *and* "specific performance of the Rebate Program," J.A. 62—what respondents describe (Br. 45) as a request "to keep the business practice going." It is undisputed that "keep[ing] that business practice going," even for just one plaintiff, would impose direct fixed human and technical resource costs on petitioners exceeding $75,000. Indeed, respondents themselves concede (Br. 37 n.27) that if their complaint is read as requesting reinstatement of the Rebate Program—in other words, if it is read as respondents themselves *wrote* it—then the amount-in-controversy requirement is satisfied. That should be the end of the matter.

ARGUMENT

I. RESPONDENTS FAIL TO JUSTIFY A "PLAINTIFF'S VIEWPOINT ONLY" RULE.

The threshold question in this case is whether the diversity statute bars courts from examining the "sum or value" of the "matter in controversy" in terms of the costs the relief sought by the plaintiff would impose on the defendant. As our opening brief explained, the text of the statute includes no such bar, and this Court's cases have not read one into the statute. Such a bar, moreover, would contradict the fundamental policies underlying the statute.

In reply, respondents manufacture an artificial and elusive distinction between "the object of the litigation" and the actual injunction a plaintiff requests.[1] According to respondents (Br. 20), the "object of the litigation" denotes solely "the right(s) sought to be protected by the complaint": It is

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[1] Respondents also suggest (Br. 18) that "strict construction" of the diversity statute militates in favor of barring consideration of the defendant's viewpoint. But respondents do not suggest *any* construction of the *text itself* that supports the "plaintiff's viewpoint only" rule. Indeed, strictly construed, the text supports only the "either viewpoint" rule. Pet. Br. 10-12.

not, they say, the actual injunction a plaintiff requests to protect that right. Accordingly, respondents assert, when an injunction is sought to protect a right, all that matters for purposes of the amount in controversy is the pecuniary value that the plaintiff will accrue from the protection of the right; the larger, fixed costs to the defendant of securing the plaintiff's right through the relief requested are immaterial.

Neither logic nor precedent support this effort to base federal jurisdiction on speculation about the supposed value of the "object of the litigation" as a concept distinct from the injunctive relief respondents actually request.

1. To begin with, equating the value of the "object of the litigation" with the value of the "right" to be gained by the plaintiff wholly begs the question: value *to whom* of that right? When it is clear that the protection of a right through an equitable order would impose a cost on the defendant greater than the value received by the plaintiff, there is no logical reason for courts to disregard the defendant's valuation. The fact that there is a difference between the value of the right a plaintiff seeks to gain and the cost to the defendant of providing that right does not establish that the object of the litigation is only the former, and not the latter.

Respondents' discussion of the "object" of their own litigation proves the point. Respondents assert (Br. 22) that "the *object* of the injunction sought is to force the Petitioners to pay each plaintiff what they [sic] are separately owed under their individual contracts," and that "[p]etitioners can relieve themselves of further liability by paying to each what they owe." According to respondents (Br. 21-22), "the object of this litigation . . . becomes abundantly clear from the realization that were Petitioners to give each putative class member $3,500 toward the purchase or lease of their next qualifying Ford vehicle, the 'controversy' relevant to the injunction sought would disappear."

This is incorrect. The only thing respondents' example makes "abundantly clear" is the *difference* between the individuated monetary payment suggested in their example and the actual injunctive relief their complaint seeks, *viz.*, the right to participate in the Rebate Program, and to accrue rebates toward the purchase of a Ford vehicle. Indeed, as we explained in our opening brief (Br. 28), respondents' injunction claim does not even seek any particular rebate payments—presumably because the amount of an individual's ultimate rebate entitlement depends in part on purchases *yet to occur* and, even then, would have value only if used to purchase a Ford vehicle. As a result, no class member has an individual, liquidated claim in any amount at present; instead, each has only an interest in re-establishing the Rebate Program.

To be sure, the presumed object of each individual class member *as a consumer* might ultimately be to accrue the maximum amount of rebates and to redeem those rebates through a qualifying purchase of a Ford vehicle. But that is not the "object" of *this litigation*, because respondents do not seek rebates in any particular amount—they seek only restoration of the right to accrue and use rebates *through the Program*. While each putative class member might be willing to *settle* his or her claim for injunctive relief for a $3500 individuated payment,[2] respondents' Consolidated Complaint demands "specific performance of the Rebate Program." J.A. 62. As the Seventh Circuit has explained, "[t]he amount in controversy is whatever is required to satisfy the plaintiff's

[2] Respondents cite no cases of this Court holding that a speculative settlement value determines the amount in controversy. Moreover, respondents seek not only damages and injunctive relief, but also punitive damages, which would figure into any settlement demand. While the question whether the non-aggregation rule affects punitive damages requests is not before the Court, the existence of respondents' request demonstrates the fallacy of focusing solely on the settlement value of some vaguely described "object of the litigation," as opposed to the *remedies* the plaintiff elects to put into controversy.

demand, in full, on the date suit begins." *Hart* v. *Schering-Plough Corp.*, 253 F.3d 272, 273 (7th Cir. 2001).[3] This is what it means for the plaintiff to be the master of his or her complaint, *see Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 399 (1987): The jurisdictional analysis focuses on the precise claims contained in the complaint, not on some more generalized notion of what the plaintiff class would be prepared to accept to settle or otherwise abandon those claims.[4]

2. The cases of this Court cited by respondents do not support their contention that the value of a requested injunction is determined solely by the value plaintiffs ultimately could obtain were the injunction granted. *Mississippi & Missouri Railroad Co.* v. *Ward*, 67 U.S. (2 Black) 485 (1862), is the clearest example. That case was an action to remove a bridge across the Mississippi River on a public nuisance theory. The Court held that "the removal of the [bridge] is the

[3] Although the test is commonly described as looking to the "object of the litigation," the analysis is actually conducted on a claim-by-claim basis, so that different claims can have different objects—here, the receipt of compensation, the receipt of a punitive damages award, disgorgement of unjust enrichment, and the receipt of certain injunctive relief. Were it otherwise, one could evaluate the claim for compensatory damages, *e.g.*, by looking to the value of the claim for injunctive relief. No cases support that approach; all of them analyze complaints on a claim-by-claim basis, as the court of appeals did below.

[4] Respondents suggest (Br. 13, 31-32) that establishing federal jurisdiction on the basis of the undisputed cost to petitioners of reinstating the Rebate Program would violate the rule that jurisdiction is to be "determined by the allegations of the complaint" and not on the basis of "subsequent pleadings by the defendant." Br. 32 (quoting *Great Northern Railway Co.* v. *Alexander*, 246 U.S. 276, 281 (1918)). That is incorrect. *Great Northern* and other cases simply establish that jurisdiction can only be premised on matters put in controversy by the complaint, and not on new objects of controversy introduced in later pleadings (such as counter-claims). Federal courts routinely hold evidentiary hearings or otherwise receive evidence—as done here (*see* J.A. 73-86, 87-89)—to establish the value of the claims raised in the complaint. *See* 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3702, at 70 (1998).

matter of controversy, and the value of the object must govern." *Id.* at 492. Notably, the Court understood that the matter in controversy was not the plaintiff's right to be free from the nuisance, but the injunctive relief requested, *i.e.*, removal of the bridge. Nor did the Court assess the value *to the plaintiff* of abating the public nuisance by removing the bridge.[5] The bridge was owned by the defendant, and the cost *to the defendant* of removing the bridge was deemed to be the value of the matter in controversy.

Though fully conceding that in *Ward* "the amount-in-controversy was measured by the *cost* to remove the bridge," respondents nevertheless insist that the case supports the "plaintiff's viewpoint" rule on the baffling ground that "the 'object of the litigation' [was] . . . valued in accordance with what the plaintiff sought to accomplish or obtain through the litigation." Br. 30 (emphasis added). True, the cost was valued in accordance with what the plaintiff sought to obtain, but what the plaintiff sought to obtain was the removal of the bridge, and that cost was imposed solely on the defendant.

Respondents' analysis of *Market Co.* v. *Hoffman*, 101 U.S. (11 Otto) 112 (1879), is likewise without merit. In *Hoffman*, over two hundred tenants of stalls in a market joined in an action seeking to enjoin the owner of the stalls from selling all the stalls to a third party. The Court upheld federal jurisdiction on the basis of the cost of the requested injunction to the defendant, citing evidence that, but for the injunction, the defendant could sell all the stalls together for a sum far exceeding the jurisdictional minimum. *See id.* at 113-14. Respondents contend (Br. 29) that *Hoffman* actually supports the "plaintiff's viewpoint" rule by observing that "the purpose of the lawsuit was to enjoin the sale [of all the

[5] Respondents' suggestion (Br. 30) that "the value of the litigation to the plaintiff was identical to the cost to the defendant" is thus unsupported. It is also unsupportable: Respondents do not explain how a plaintiff seeking the destruction of a bridge will obtain the exact same monetary value the bridge owner loses from its destruction.

stalls]," and thus that "the 'object of the litigation,' from the plaintiff's perspective also happened to be the cost to the defendant." Once again, it is true that prohibition of the sale of all the stalls was the "object of the litigation," but the Court did not say a word about the value *to the plaintiffs* of the right to continued use of the stalls. The only value the Court considered was the amount *the defendant* could have obtained by sale of all the stalls in the absence of the injunction.

Ward and *Hoffman* establish that when the plaintiff seeks to protect a right through an injunction, not only is the requested relief the object of the litigation, but the value of that object may be assessed from the defendant's perspective.[6] *See also Flast* v. *Cohen*, 392 U.S. 83 (1968) (noting that complaint seeking injunction against enforcement of federal statute involves expenditure of funds by defendant, without examining value of injunction to plaintiff). Not one of the other cases on which respondents rely (Br. 27-28) has held to the contrary.[7]

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[6] *Smith* v. *Adams*, 130 U.S. 167 (1889), on which respondents also rely (Br. 11, 20), likewise affirmatively supports jurisdiction. The *Smith* Court observed that "the value of the matter in dispute may be determined not only by the money judgment prayed [by the plaintiffs] . . . but . . . by the pecuniary result to *one of the parties* immediately from the judgment." *Id.* at 175 (emphasis added). Respondents misread a reference in *Smith* describing the "subject of litigation" as "the matter upon which the action is brought and the issue is joined, and in relation to which, if the issue be one of fact, testimony is taken" *id.*, to mean that testimony must be taken on the *value* of the subject of litigation. That is incorrect. *Smith* says only that the subject of the litigation can be ascertained by reference to what the testimony in the case will be about; obviously in this case almost all the testimony would center on the Rebate Program. Notably, in neither *Ward* nor *Hoffman* did the Court suggest that testimony as to the cost of the injunction would be a material issue at trial.

[7] Respondents cite *Russell* v. *Stansell*, 105 U.S. (15 Otto) 303 (1882), and *Ross* v. *Prentiss*, 44 U.S. (3 How.) 771 (1844), for the related proposition that the "object" of the litigation in an injunction case must be distinct from the cost of the injunction itself. Neither case supports that proposition. In *Stansell*, the plaintiffs sued to enjoin enforcement of a

For instance, respondents incorrectly state (Br. 25) that in *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121 (1915), "this Court specifically rejected the notion that jurisdiction could be established by the cost to the defendant." The district court had held that there was *no* jurisdiction because the defendant's costs were less than the jurisdictional minimum; this Court held only that the district court wrongly ignored the value to the plaintiff of its requested injunction. *Glenwood* thus "does not exclude the possibility that jurisdiction also will be present if the value to the defendant is greater than the statutory requirement, even when the benefit to the plaintiff is a lesser sum." 14B *Federal Practice and Procedure*, *supra*, § 3703, at 119-20.

The same is true for *Hunt* v. *New York Cotton Exchange*, 205 U.S. 322, 336 (1907) (rejecting defendant's argument that jurisdiction was improper simply because its own costs were less than the jurisdictional minimum), and *Bitterman* v. *Louisville & Nashville Railroad Co.*, 207 U.S. 205, 224-25 (1907) (finding jurisdiction on basis of the value of the business plaintiff sought to protect by enjoining defendant's

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series of small assessments against their lands, the total of which exceeded the jurisdictional minimum. 105 U.S. at 303-04. The Court's rejection of jurisdiction under those circumstances is wholly consistent with a finding of jurisdiction here. *See infra* at 15-16. In *Ross*, the defendant U.S. Marshall had levied a judgment debtor's land and planned to sell it to execute a judgment worth less than the jurisdictional minimum. Plaintiff, who had a preexisting security interest in the land, sued, claiming that the land was not properly chargeable with execution of the minor debt. Though plaintiff sought an injunction against the sale of the land on the theory that the sale might ultimately jeopardize his security interest in the land, the Court held that the request was only designed to prevent "contingent loss or damage" to the plaintiff from an adverse decision, and thus was wholly collateral to the "only matter in controversy between the parties," *viz.*, "the amount claimed on the execution," 44 U.S. (3 How.) at 772. *Ross* does not purport to require courts to disregard the cost of an injunction when it is actually the object of the litigation—as with removal of the bridge in *Ward*, or with the reinstatement of the Rebate Program here.

acts). In neither of those cases, nor any of the others cited by respondents, did the Court purport to bar courts assessing the amount in controversy from considering the cost to a defendant of granting a requested injunction. *See* 14B *Federal Practice and Procedure*, *supra*, § 3703, at 120 (proponents of "plaintiff's viewpoint" rule cannot point to "any Supreme Court decision rejecting subject matter jurisdiction when the statutorily prescribed amount in controversy was satisfied from the defendant's viewpoint, but not from the plaintiff's"); *Hoffman* v. *Vulcan Materials Co.*, 19 F. Supp. 2d 475, 480 (M.D.N.C. 1998) ("Courts which utilize the plaintiff-viewpoint rule are, of course, unable to cite to a Supreme Court decision that directly mandates it."); U.S. Br. 17 ("the Court has not held that the [amount in controversy] requirement cannot . . . be satisfied based on the value to the defendant of defeating the injunction").

3. Indeed, as respondents correctly point out (Br 32 n.27), a prospective defendant can almost always render itself a plaintiff for purposes of the "plaintiff's viewpoint only" rule by filing a preemptive declaratory judgment action. That only confirms the case for the "either viewpoint" rule. As the Solicitor General explains (Br. 13), the "plaintiff's viewpoint only" rule "would create an artificial incentive to sue for potential defendants who favor a federal forum, and could even prompt a race to the courthouse." If petitioners here had sued first for a declaration regarding their legal obligation to maintain the Rebate Program, the cost of doing so would obviously have been the value of the matter in controversy. The declaratory judgment example demonstrates why the fixed costs of reinstating the Rebate Program must be part of the amount-in-controversy calculus.

II. RESPONDENTS FAIL TO EXPLAIN HOW THE NON-AGGREGATION RULE DEFEATS JURISDICTION WHERE THE COST TO A DEFENDANT OF A REQUESTED INJUNCTION EVEN AS TO ONE PLAINTIFF WOULD EXCEED $75,000.

The uncontroverted record evidence establishes that the "fixed costs to [petitioners] of reinstating and maintaining the [Rebate Program] would be the same whether it is done for one plaintiff or for six million." J.A. 118. That is, while it would be one thing for petitioners simply to give a single plaintiff $3500 in cash or credits toward the purchase of a Ford vehicle, it is another thing entirely for petitioners to invest the human and technical resources necessary to maintain a cross-corporate system of identifying and tracking purchases, and assigning, tracking, and verifying appropriate rebates, regardless of the number of consumers expected to participate in that system. J.A. 88-89 (Behar Decl.). The latter is exactly what the complaint requests; as respondents themselves state (Br. 45):[8]

> Pre-litigation, the Petitioners had the Rebate Program in place, the business apparatus had been designed, employees had been hired, and the Rebate Program was operational. The injunction requested, at the time the suit was filed, was simply to keep the business practice going as a means to compensate Plaintiffs for the damages suffered.

The fact that "keep[ing] the business practice going," as respondents specifically request in the complaint, would entail wholly fixed costs exceeding $75,000 is neither surprising nor disputed.

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[8] *See Pegram* v. *Herdrich*, 530 U.S. 211, 230 n.10 (2000) (party's brief may be used to "clarify allegations" in complaint).

Respondents contend that the non-aggregation rule—which bars a court from joining monetarily insufficient individual claims of multiple plaintiffs in a single action—bars consideration of these fixed costs simply because one plaintiff has joined with others to obtain the requested injunction. That is plainly incorrect, whether the complaint in this case is viewed either (a) as stating separate and distinct claims for reinstatement of the Rebate Program or (b) as asserting a common and undivided interest in participation in that Program. In the former case, jurisdiction is proper because each plaintiff's individual claim would impose fixed costs exceeding $75,000; in the latter case, the non-aggregation rule simply has no application.

1. Respondents appear to have missed the first of the two alternative arguments in our brief. They say (Br. 39-40) that we "concede that plaintiffs' claims are separate and distinct," and that we argue only that "the relief sought . . . is common and undivided." But we have never conceded that the claims are necessarily separate and distinct. What we demonstrated (Br. 18-26) was that *even if they are*, each distinct claim is jurisdictionally sufficient on its terms.

Respondents themselves do not dispute that the non-aggregation rule cannot bar jurisdiction where each separate and distinct claim for injunctive relief is jurisdictionally sufficient on its own terms.[9] Instead, they suggest that the facts

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[9] Respondents' amicus Trial Lawyers for Public Justice ("TLPJ") argues (Br. 8, 12) that although jurisdiction may be proper when one plaintiff seeks an injunction that would cost the defendant more than $75,000, jurisdiction does not lie if enough plaintiffs are joined such that dividing the cost of the injunction among them reduces each individual's share of the costs to less than $75,000. That kind of rule would flatly contradict the settled proposition that joinder rules may neither expand nor limit jurisdiction. Resp. Br. 21; U.S. Br. 21-22. We have already explained why *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), does not compel that result, as TLPJ contends (Br. 12): *Zahn* holds only that jurisdiction may not be derived by aggregating individually insufficient claims; there simply *is no aggregation* when each plaintiff's claim for an injunction, viewed individually, would exceed $75,000.

of this case do not support jurisdiction on that basis.[10] That suggestion is manifestly incorrect.

a. Respondents first state (Br. 42) that the district court in this case "found that Petitioners failed to prove" that the fixed costs to petitioners would actually exceed $75,000. Respondents are wrong.[11]

Respondents rely on the district court's comment that petitioners "failed to show that the *value* of the injunction as to any one cardholder would exceed $75,000." J.A. 97 (emphasis added). But that comment does not reflect a "finding" that petitioners failed to prove that the *cost* of reinstituting the entire Rebate Program as to only one plaintiff would exceed $75,000. Indeed, as we have described in detail (Br. 3, 15-16), the district court acknowledged the undisputed evidence that "the fixed costs in operating a rebate program . . . exceed $75,000 per year, [and] would not depend on the extent of cardholder usage." J.A. 96 (internal quotations and citation omitted). The court simply concluded, erroneously, that as a matter of law such fixed, programmatic costs are irrelevant because the maximum "value" any individual cardholder could possibly accrue under the Program could not exceed $3500. J.A. 96-97. That conclusion simply re-

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[10] Respondents (Br. 3) note that in the district court, petitioners opposed class certification in part on the stated grounds that the case "does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions." J.A. 92 n.2. That statement is in no way inconsistent with our principal submission that, even if petitioners must comply with the requested reinstatement of the Rebate Program for the benefit of a single plaintiff, the cost of doing so will well exceed the statutory threshold.

[11] Indeed, respondents elsewhere properly concede (Br. 37-38 n.27) that the cost to petitioners of complying with the requested injunction exceeds the jurisdictional minimum.

flects the same legal error underlying petitioners' argument here, *viz.*, that the "object" of a claim for an injunction is somehow distinct from the claimed injunction itself.

b. Respondents also suggest (Br. 42-43) that attributing the cost of complying with the injunction to both Ford and Citibank would entail impermissible defendant-side aggregation. Again, this misconceives the principle of non-aggregation. Impermissible aggregation is a matter of adding together different *claims*, not assessing the value or cost of *a single claim* made jointly against two defendants. As respondents' amicus explains: "In cases involving more than one defendant, a plaintiff may aggregate the amount claimed against multiple defendants 'only if the defendants are jointly liable.'" Ass'n of Trial Lawyers of America Br. 10 (quoting *Middle Tennessee News Co.* v. *Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001)); *see Walter* v. *Northeastern Railroad Co.*, 147 U.S. 370, 373 (1893) ("[W]hen two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff."). Because respondents' claim here asserts joint liability,[12] the only question is whether the cost of that liability would exceed $75,000—regardless of which, or how many, defendants will ultimately have to shoulder those costs.

c. Respondents finally suggest (Br. 43) that the "ministerial or administrative" costs of complying with an injunction should be disregarded. That argument is incorrect and, in any event, inapplicable here.

To begin with, nothing in the text or purpose of the diversity statute supports dividing defendants' costs into "acceptable" and "unacceptable" categories. *See* Pet. Br. 23.

[12] The complaint alleges, for example, that the petitioners acted together to issue credit cards under the Program (J.A. 49, 52), deceived respondents through uniform mail solicitations (J.A. 52, 57), and jointly operated the Rebate Program (J.A. 49; Resp. Br. 45).

Any such distinction would be guaranteed to breed wasteful jurisdictional litigation. *Id.*

This Court nevertheless need not decide in this case whether "ministerial or administrative" costs are properly excludable, for the costs at issue cannot fairly be so categorized. As noted above, respondents themselves acknowledge (Br. 45) that their claim for injunctive relief seeks to "keep the business practice going." While it is of course true that courts exclude from the amount-in-controversy calculus "objects which are merely collateral or incidental to the determination of the issues raised by the pleadings," *Healy* v. *Ratta*, 292 U.S. 263, 268 (1934), the costs of maintaining the Rebate Program are not "merely collateral or incidental" to the object of this litigation. They *are* the object, because what respondents seek is to "keep [the Rebate Program] going." Those costs are indistinguishable from the costs to the defendant of removing the bridge at issue in *Ward*, or of shutting down a hazardous-waste generating facility, or of conducting a research study. *See* Pharma. Res. Br. 19.[13] They are completely distinct from purely collateral compliance costs, such as the costs of copying an injunction and notifying all personnel of its strictures. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997).

The facts of *Snow* v. *Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977)—a case respondents (Br. 44) mistakenly conclude would have been removable under our analysis—exemplify this point. The plaintiff class in *Snow* challenged Ford's failure to provide an $11.00 wiring kit with certain auto trailer

[13] Respondents err in suggesting (Br. 24 n.17) that the costs of reinstating the Rebate Program are irrelevant because petitioner Citibank might profit from reinstatement of the Program. A speculative *allegation* of some future economic benefit does not alter the *undisputed record fact* that reinstating the Program would impose immediate fixed costs of greater than $75,000. *See also* J.A. 54 (the complaint alleges in any event that, prior to termination the Program "was quickly becoming unprofitable due to its success").

packages. The complaint sought $11.00 in damages for each purchaser, $5 million in punitive damages, and an injunction requiring Ford to provide the kit in all future packages. 561 F.2d at 790. The plaintiffs did *not* seek the establishment (or abatement) of a particular business operation; what they sought was the provision of a particular thing of value. Obviously, there was no evidence that providing the $11.00 kit to a single plaintiff would impose costs on Ford exceeding the jurisdictional minimum. The relief requested in *Snow* thus differed from an individuated damages request only in that it sought provision of an object, rather than money. *Cf. Campbell* v. *General Motors Corp.*, 19 F. Supp. 2d 1260, 1267 (N.D. Ala. 1998) (finding "no meaningful distinction between money damages and in-kind replacement of a defective part").

Here, by contrast, respondents do not seek a particular thing, or a liquidated rebate amount. Unlike *Snow*, this is simply not "a class action that constitutes nothing more than the joinder/consolidation of multiple suits for $3,500 or less." TLPJ Br. 17. On the contrary, respondents seek to compel petitioners to re-initiate a specified business operation, which will cost petitioners more than $75,000 to do, even if only a single plaintiff ever chooses to avail himself or herself of the benefits of that business operation. *Cf. In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 718 (D. Md. 2001) (jurisdictional minimum satisfied where injunction sought to compel company to "redesign[] its operating system software," which "would cost millions of dollars"). The difference between *Snow* and this case demonstrates precisely why not every request for an injunction in a case involving a large defendant will support jurisdiction. Assuming there is complete diversity, the question will be whether the cost of complying with the injunction for even a single plaintiff exceeds $75,000 because it seeks to alter a business operation, or only as the impermissible result of aggregating jurisdictionally insufficient per-plaintiff costs.

2. As our opening brief demonstrated (Br. 26-31), jurisdiction is also proper because the respondents assert a common and undivided interest in participation in the Rebate Program. Indeed, the claim for reinstatement of the Rebate Program shares the principal characteristics of claims previously identified by this Court as "common and undivided." And when a claim is "common and undivided," the non-aggregation rule is simply inapplicable. The value of the matter in controversy is the overall value of the monetarily sufficient common and undivided claim. *See Snyder* v. *Harris*, 394 U.S. 332, 341 (1969); *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1973).[14]

Respondents' only argument that the interest they assert is not common and undivided depends, again, upon a distinction that this Court has never recognized and that their own complaint refutes. In respondents' view, the "claim" of any single plaintiff is not the specific relief the complaint seeks but rather the pecuniary value of the *benefit* he or she would realize from an award of that relief. But respondents cite no cases from this Court in support of that distinction. Indeed, to the contrary, many cases discussing characteristics typical of common and undivided claims focus explicitly on the nature of the relief at issue. *See, e.g., Texas & Pac. Railway Co.* v. *Gentry*, 163 U.S. 353, 360-61 (1896); *Shields* v. *Thomas*, 58 U.S. (17 How.) 3, 5 (1854).

Moreover, the Consolidated Complaint itself demonstrates that respondents' "claim" is not for individuated bene-

[14] Respondents incorrectly describe (Br. 40) our argument as stating that because their claim for reinstatement of the Rebate Program is common and undivided, "its value to Plaintiffs may be aggregated to meet the jurisdictional threshold." That is decidedly *not* our argument. First, the question of individual value "to Plaintiffs" is irrelevant. When plaintiffs seek common and undivided relief, the total cost to the defendants is sufficient to establish jurisdiction under the either viewpoint rule. Second, if that relief is in fact common and undivided, then it is of no consequence whether the value of the claim to any one plaintiff is above or below the jurisdictional minimum.

fits, but rather for reinstatement of a program in which they have a common and undivided interest. In their brief, respondents argue (Br. 41) that since "each class member will be owed a separate rebate amount and damages, assuming the lawsuit is successful," therefore "aggregating Plaintiffs' claims would violate the non-aggregation principle." But that description of respondents' "claims" ignores the fact that the claim at issue does not *seek* "rebate amount[s] and damages" (nor could it, *see* p. 5, *supra*), but rather reinstatement of the Rebate Program. Ultimately, if their action is successful, individual respondents will avail themselves of differing levels of rebates under that Program, but in this litigation itself they all share the *same* interest in the *right to seek* rebates under the common "business practice." *See Gibbs* v. *Buck*, 307 U.S. 66, 71-76 (1939) (plaintiffs with individual copyright licenses under integrated licensing scheme have common and undivided interest in enjoining enforcement of state law barring blanket licensing of copyrights); *Hoffman*, 101 U.S. (11 Otto) at 113-14 (plaintiffs with individual market stall-use contracts have common and undivided interest in enjoining common re-sale of stalls).

III. THE COURT OF APPEALS CORRECTLY DETERMINED ITS APPELLATE JURISDICTION.

The Solicitor General, supporting petitioners, obliquely raises an issue regarding appellate jurisdiction. U.S. Br. 4 n.1. The court of appeals explicitly and thoroughly evaluated that issue and correctly concluded that the judgment of the district court was an appealable dismissal of the action, not a nonappealable remand order. Pet. App. 6a. Respondents took no issue with that determination in the opposition to certiorari, and do not raise any issue now.

The removed state-court actions in this case were consolidated in the district court pursuant to the multidistrict litigation ("MDL") statute. There, respondents voluntarily elected to "bring *this* action [*i.e.*, the Consolidated Complaint] on behalf of themselves and all other persons similarly situated." J.A. 49 (emphasis added). The operative action, therefore, is the self-described "consolidated class action,"[15] which differs significantly from the underlying state-court complaints. For example, only two of the underlying complaints sought specific performance of the Rebate Program—and even those complaints sought specific performance only as an alternative to compensatory damages. Another underlying complaint disclaimed injunctive relief altogether. When plaintiffs voluntarily file an amended complaint under these circumstances, it supersedes their prior state-court actions. *See, e.g., Eyak Native Village* v. *Exxon Corp.*, 25 F.3d 773, 781 (9th Cir. 1994); *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272, 1275 (E.D. Mo. 1996), *aff'd in part and rev'd in part on other grounds sub nom. Campos* v. *Ticketmaster*, 140 F.3d 1166 (8th Cir. 1998); *see also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed. 1990) (amended complaint supersedes previously filed complaints); 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.17[3] (3d ed. 2002) (same).[16]

The district court's order was thus necessarily a dismissal of the current action, not a remand. And although the jurisdictional dismissal was entered nominally in petitioners' favor, it was not favorable to them, because it deprived petitioners of their right to a federal forum for litigation of the claims against them. This Court has acknowledged that even

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[15] J.A. 49; *cf.* Resp. Br. 4 n.2 (acknowledging that the district court intended to dismiss and "dispose of *the* federal action" (emphasis added)).

[16] It has been suggested that when an MDL court *orders* the filing of a consolidated complaint purely for administrative convenience, the new complaint may not supplant the prior actions. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2382 (1995). But where the plaintiffs *voluntarily elect* to file an amended complaint, as they did here, then the new complaint defines the action and the prior actions no longer exist, as the authorities cited in the text explain.

a party on whose behalf a judgment is nominally entered may appeal, when the party is sufficiently "aggrieved" by the judgment so as to "retain[] a stake in the appeal." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 236, 333-34 (1980); *see Forney* v. *Apfel*, 524 U.S. 266, 271 (1998). So it is here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

FORD MOTOR COMPANY AND
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v.

JOHN B. MCCAULEY, ET AL.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the cost to the defendant of complying with an injunction sought by a plaintiffs' class may satisfy the amount-in-controversy requirements of the diversity jurisdiction statute, where such compliance would cost the defendant more than the $75,000 jurisdictional amount whether it covered the entire class or any single member of the class.

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Brittain S. McInnis, *The $75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998) 11, 16, 27
15 *Moore's Federal Practice* (3d ed. 1998) 14, 15, 19
Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986) 29

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Charles A. Wright et al., *Federal Practice and Procedure*:
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In the Supreme Court of the United States

No. 01-896

FORD MOTOR COMPANY AND
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v.

JOHN B. MCCAULEY, ET AL.

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

The diversity jurisdiction statute, 28 U.S.C. 1332, confers upon the federal district courts jurisdiction over cases in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," and the parties are citizens of different States or citizens of a State and citizens of a foreign country. Congress established the amount-in-controversy requirement in the Judiciary Act of 1789, and adjusted the amount on several subsequent occasions, to confine diversity jurisdiction to relatively significant cases. Congress has not, however, directed that the amount in controversy be assessed only from the perspective of the plaintiff. To the contrary, the general statutory

text focuses on the "value" of "the matter in controversy," and allows that value to be considered from the perspective of either party.

The United States has a significant interest in an interpretation of the amount-in-controversy requirement that, in cases seeking equitable relief, measures that amount either by the benefit to the plaintiff or the cost to the defendant, whichever is greater. In class actions, such as this one, the requirement is satisfied if the defendant's cost of providing injunctive relief to any class member exceeds $75,000. Such an understanding of the amount-in-controversy requirement serves Congress's purpose of assuring a neutral national forum for the adjudication of all substantial disputes between persons of diverse citizenship. In addition, such an interpretation avoids creating incentives to file preemptive suits in federal court and tensions between 28 U.S.C. 1332 and Federal Rule of Civil Procedure 23. More broadly, the rules governing class actions have enormous consequences for the federal courts and interstate commerce, and the United States has previously participated as an amicus curiae in such cases. See, *e.g.*, *Devlin* v. *Scardelletti*, No. 01-417 (argued Mar. 26, 2002).

STATEMENT

1. In early 1993, petitioners Ford Motor Company (Ford) and Citibank (South Dakota), N.A. (Citibank), issued a credit card that offered cardholders the opportunity to save on the purchase or lease of a new Ford vehicle. Under the program, cardholders earned a 5% rebate on each purchase made using the credit card, redeemable on the purchase or lease of certain Ford vehicles. Cardholders could accrue a maximum of $700 in rebates per year (representing $14,000 in purchases)

over a five-year period, for a maximum possible rebate of $3500. On December 31, 1997, less than five years after the program's inception, Ford and Citibank terminated the rebate accrual feature of the credit card. Pet. App. 3a.

2. After the termination of the rebate program, cardholders filed suits against Ford, and in some instances also against Citibank, in state courts in Washington, Oregon, California, Illinois, Alabama, and New York. They alleged that Ford and Citibank misrepresented or withheld information about the nature and duration of the program and wrongfully discontinued it. Ford and Citibank removed the cases to federal district court on the basis of diversity jurisdiction. Pursuant to 28 U.S.C. 1407, the Judicial Panel on Multidistrict Litigation transferred the cases to the United States District Court for the Western District of Washington for coordinated pretrial proceedings. Pet. App. 3a.

The district court consolidated the cases. The plaintiffs (respondents here) filed a consolidated complaint in that court on behalf of a nationwide class of nearly six million Ford/Citibank cardholders. The consolidated complaint asserted state-law causes of action for breach of contract, unjust enrichment, and violation of state consumer protection statutes. Consolidated Complaint 8-13. As relief, the complaint sought compensatory damages, punitive damages, and an injunction ordering "specific performance of the Rebate Program." *Id.* at 13. The complaint pleaded diversity jurisdiction under 28 U.S.C. 1332. Consolidated Complaint 3; see Pet. App. 3a-4a.

The plaintiffs moved for class certification under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure. The district court, however, did not rule on

that request. Instead, acting on its own motion, the court held that it lacked subject-matter jurisdiction over the case, reasoning that the $75,000 amount-in-controversy requirement of the diversity jurisdiction statute was not satisfied. The court dismissed the consolidated complaint and remanded the underlying cases to their state courts of origin. Pet. App. 4a-5a, 23a-33a.

3. The United States Court of Appeals for the Ninth Circuit affirmed in part and dismissed in part. The court dismissed as unappealable petitioners' challenge to the district court's remand order, see 28 U.S.C. 1447(d), but upheld the district court's conclusion that diversity jurisdiction did not exist with respect to respondents' consolidated complaint. Pet. App. 13a-20a.[1]

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[1] The court of appeals held that it had appellate jurisdiction under 28 U.S.C. 1291 to review the district court's order dismissing the consolidated complaint, apparently on the ground that the dismissal of the complaint, without leave to amend, was tantamount to a "dismissal of the action." Pet. App. 6a. If, however, the consolidated complaint is viewed as being in the same "action" as the removed state-court complaints, the district court did not dismiss the action, but instead remanded it, which is not an appealable decision. 28 U.S.C. 1447(d). It would be questionable in that circumstance whether the court of appeals had jurisdiction to review the dismissal order. If, however, the consolidated complaint is viewed as being in a separate "action" from the removed state-court complaints, the district court could have dismissed that action, while remanding the separate actions commenced by the state court complaints. The court of appeals' exercise of appellate jurisdiction would seem permissible in that circumstance, although it is less clear that petitioners would be the property parties to appeal the dismissal of the consolidated complaint filed against them. Respondents did not dispute appellate jurisdiction in their brief in opposition in this Court.

In examining the question of diversity jurisdiction under Section 1332, the court of appeals observed that "the sole jurisdictional question is whether the minimum amount in controversy required to maintain a diversity suit in federal court is present." The court noted that the diverse citizenship of the parties was not contested. Pet. App. 6a.

First, the court of appeals concluded that the plaintiffs' claim for compensatory damages did not satisfy the amount-in-controversy requirement of Section 1332. The court noted that "Ford and Citibank do not contend that any plaintiff has an individual damages claim exceeding $75,000." Nor did Ford and Citibank contend that the plaintiffs were asserting "a common and undivided interest in a claim for damages" that could satisfy the amount-in-controversy requirement. Pet. App. 6a-7a.

Second, the court of appeals held that the plaintiffs' claim for an injunction could not satisfy the amount-in-controversy requirement. The court noted that the lower courts have taken different approaches to measuring the amount in controversy with respect to claims for injunctive relief: some courts apply a "plaintiff-viewpoint" approach, which considers only the value of the requested injunction *to the plaintiff*, while other courts apply an "either viewpoint" approach, which also considers the defendant's cost of complying with the requested injunction. Pet. App. 7a-8a.

The court of appeals noted that, although the Ninth Circuit had applied the "either viewpoint" approach in earlier cases, it had not done so in a class action. See Pet. App. 8a (citing *Snow* v. *Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977)). The court reasoned that applying the "either viewpoint" approach in a class action would violate the rule against aggregation of claims

articulated in *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), because "plaintiffs with minimal damages could dodge the non-aggregation rule by praying for an injunction." Pet. App. 9a. Accordingly, although Ford and Citibank maintained that compliance with the requested injunction would cost them more than $75,000, the court concluded that the amount-in-controversy requirement was not satisfied. *Id.* at 10a.

The court of appeals recognized that the rule against aggregation is not violated when plaintiffs have "a common and undivided interest" in their claim for relief. The court concluded, however, that the plaintiffs, who "charged purchases and accrued rebates individually, not as a group," did not have a "common and undivided interest in accruing rebates under the program." Pet. App. 10a.

Finally, the court of appeals held that the plaintiffs' claim for punitive damages did not satisfy the amount-in-controversy requirement. The court reasoned that "punitive damages asserted on behalf of a [putative] class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest." Pet. App. 17a (quoting *Gilman* v. *BHC Sec., Inc.*, 104 F.3d 1418, 1431 (2d Cir. 1997)).[2]

SUMMARY OF ARGUMENT

I. Congress has authorized federal district courts to exercise jurisdiction over "all civil actions" between

[2] This Court granted the writ of certiorari only with respect to Question 1 in the petition, which concerns the claim for injunctive relief, and not with respect to Question 2, which concerns the claim for punitive damages.

parties of diverse citizenship "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. 1332(a) (1994 & Supp. V (1999). The text of the diversity jurisdiction statute focuses on the "value" of "the matter in controversy." Nothing in the statute confines the analysis of that value to the plaintiff's perspective when a case seeks injunctive or other equitable relief that the plaintiff and defendant value differently. To the contrary, the text is most naturally understood as allowing the amount in controversy to be measured from either party's perspective in such cases. It is thus sufficient that either the benefit of an injunction to the plaintiff or the cost of an injunction to the defendant exceeds $75,000.

Such a rule advances Congress's purpose of providing a neutral national forum for the resolution of all substantial disputes involving diverse parties. A case is equally substantial whether the potential benefit to the plaintiff exceeds $75,000 or the potential cost to the defendant exceeds $75,000. Such a rule also accords with Congress's purpose, expressed in the removal statute, of assuring out-of-state plaintiffs and out-of-state defendants comparable access to federal court. It enables either party to seek a federal forum when its own stake in the case exceeds the jurisdictional amount. For such reasons, a number of lower courts and commentators agree that the amount in controversy should be valued from either party's perspective.

II. Nothing in the procedural rules permitting class actions requires abandoning the "either perspective" rule in such actions. Although the court below has long applied the "either perspective" rule in single-plaintiff, single-defendant suits, it concluded that precedents of

this Court precluded application of the rule in class suits. That view is mistaken.

In class actions seeking injunctive relief, the amount in controversy is appropriately measured by the benefit or cost of an injunction running from one plaintiff to one defendant. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997) (Posner, C.J.), cert. denied, 522 U.S. 1153 (1998). Such an analysis, by separately considering the value of each plaintiff's claim against each defendant, assures that the procedural class action device neither expands nor contracts the scope of the diversity jurisdiction authorized in 28 U.S.C. 1332. A court may exercise diversity jurisdiction over a class action if, but only if, it could have exercised diversity jurisdiction over individual actions by each class member.

The court below concluded that assessing the amount in controversy from the defendant's perspective somehow ran afoul of the non-aggregation principle of *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 414 U.S. 291, 294 (1973). But the "either perspective" rule is consistent with *Snyder* and *Zahn*. Those cases hold that plaintiffs cannot create diversity jurisdiction by using the class action device to aggregate claims that would not independently satisfy the amount-in-controversy requirement. Whether a federal court may exercise diversity jurisdiction over a class action thus turns on whether a federal court could exercise diversity jurisdiction over a traditional single-plaintiff, single-defendant action asserting the same claims. The appropriate application of the "either perspective" rule in the class action context is to ask whether the value of the requested injunction would be worth more than $75,000 to either the plaintiff or defendant in a single-plaintiff, single-

defendant action. By refusing to apply the "either perspective" rule in class actions, the court below allows plaintiffs, by bringing their claims in a class action, to divest federal jurisdiction that would exist in an individual action. That result is inconsistent with the spirit of *Snyder* and *Zahn* and the principle that the Federal Rules should not alter the reach of jurisdictional statutes.

Allowing class actions involving diverse parties to be adjudicated in federal court when the amount-in-controversy requirement is satisfied from either side's perspective offers several practical advantages. As in individual actions, diversity jurisdiction assuages concerns about state court bias against out-of-state parties and provides a nationally uniform set of procedural rules to assure the fair, speedy, and inexpensive resolution of cases. In class actions, moreover, parties may benefit from the federal courts' greater resources and expertise with regard to complex litigation, the availability of a mechanism for the transfer of related cases to a single district court for coordinated or consolidated pretrial proceedings, and other incentives for efficient adjudication.

ARGUMENT

THE AMOUNT-IN-CONTROVERSY REQUIREMENT OF 28 U.S.C. 1332 IS SATISFIED IN A CLASS ACTION SEEKING INJUNCTIVE RELIEF IF THE COST TO THE DEFENDANT OF PROVIDING RELIEF TO ANY CLASS MEMBER WOULD EXCEED $75,000

I. IN A CONVENTIONAL LAWSUIT, THE AMOUNT IN CONTROVERSY IS CORRECTLY MEASURED BY EITHER THE VALUE OF AN INJUNCTION TO THE PLAINTIFF OR THE COST OF AN INJUNCTION TO THE DEFENDANT

In assessing whether the amount-in-controversy requirement of 28 U.S.C. 1332 is satisfied in a case seeking injunctive relief, a federal court should consider not only the value of the relief to the plaintiff, but also the cost of the relief to the defendant. If the amount exceeds $75,000 from either the plaintiff's or the defendant's perspective, the amount-in-controversy requirement is satisfied. That "either perspective" approach is consistent with the statutory text, advances the statutory purposes of providing a neutral national forum for all significant disputes involving diverse parties, promotes fairness between plaintiffs and defendants with respect to access to the federal courts, and avoids artificial incentives to file declaratory judgment actions in order to secure a federal forum.

A. The Text of the Diversity Jurisdiction Statute Does Not Confine the Amount-in-Controversy Analysis to the Plaintiff's Perspective

The diversity jurisdiction statute, 28 U.S.C. 1332, provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," and the parties are of diverse citizenship. Since the establishment of the lower federal courts in the Judiciary Act of 1789, their diversity jurisdiction has been conditioned on satisfaction of an amount-in-controversy requirement. Although that amount has increased over time from $500 in 1798 to $75,000 today, the text of requirement has otherwise remained essentially unchanged. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78 ("the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars").[3]

Nothing in the text of Section 1332 or its statutory predecessors states, or even suggests, that "the sum or value" of "the matter in controversy" is to be measured only from the perspective of the plaintiff. The general statutory language directs attention to the "value" of "the matter in controversy," rather than to the perspective of one party or the other. The text is most naturally understood as authorizing the exercise of diversity jurisdiction whenever the "matter in controversy" exceeds $75,000 from either the plaintiff's or the defendant's perspective. See Brittain S. McInnis, *The $75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013, 1031 (1998) (observing that "the either viewpoint rule mirrors the flexibility inherent in the statute's language").

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[3] For many years, 28 U.S.C. 1331, the general federal-question jurisdiction statute, contained a similar amount-in-controversy requirement. Some of the cases cited in the text involve that requirement.

It would seem artificial to place the "value" of "the matter in controversy" at anything less than the amount at stake for either the plaintiff or the defendant, whichever is greater. Suppose, for example, that a homeowner sues to enjoin an energy company from running a pipeline across a portion of the homeowner's property. The benefit to the homeowner of excluding the pipeline might not approach $75,000, although the expense to the energy company of rerouting the pipeline might easily exceed $75,000. In such a case, the amount in controversy for purposes of Section 1332 is most sensibly measured from the perspective of either party, "because the amount in controversy in a lawsuit exceeds [the jurisdictional amount] if either the plaintiff or defendant will have to pay that amount." Erwin Chemerinsky, *Federal Jurisdiction* § 5.3, at 292 (2d ed. 1994); see *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979) (applying "either perspective" approach on similar facts).[4]

In some cases, either party to a dispute could have initiated the suit, especially in light of the Declaratory Judgment Act. Such cases underscore the arbitrariness of valuing the dispute only from the perspective of whichever party actually did so. As the Court has observed in a related context, "[n]o matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be

[4] The "either perspective" rule makes particular sense because, as a practical matter, the value of the injunction to the plaintiff will reflect the cost of compliance to the defendant. If liability is established, a rational plaintiff would agree to settle the matter for "a shade less than the cost that the injunction would impose on the defendant." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997), cert. denied, 522 U.S. 1153 (1998).

adjudicated and determined under the same rules." *Horton* v. *Liberty Mutual Ins.*, 367 U.S. 348, 354 (1961). A rule valuing the matter in controversy solely from the perspective of the plaintiff would create an artificial incentive to sue for potential defendants who favor a federal forum, and could even prompt a race to the courthouse. In the pipeline example, the defendant could guarantee a federal forum only by promptly filing a declaratory judgment action in district court. A rule that values the matter in controversy from the perspective of either party maintains the parity between a party's right to initiate a lawsuit in federal court and its right to remove, and so eliminates the incentive to sue first.

B. The Purposes of the Diversity Jurisdiction Statute Are Advanced by Measuring the Amount in Controversy from Either Party's Perspective

Congress enacted the diversity jurisdiction statute to provide citizens of different States, or citizens of a State and citizens of a foreign country, an alternative national forum to resolve their disputes. The statute, like Article III of the Constitution, reflects the Framers' concerns about the actual or perceived partiality of state courts to local interests. See, *e.g.*, *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (observing that diversity jurisdiction rests on the presumption that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice"); *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

Congress included the amount-in-controversy requirement in the original diversity jurisdiction statute,

and subsequently adjusted the amount, in order to reserve the federal courts' diversity jurisdiction for relatively substantial cases in monetary terms. See 15 *Moore's Federal Practice* § 102.109[3], at 102-199 (3d ed. 1998) ("[T]he jurisdictional-amount requirement reflects a congressional judgment that federal judicial resources should be devoted only to those diversity cases in which the financial stakes rise to a predetermined level.").[5] Thus, when Congress raised the jurisdictional amount in 1958 from $3000 to $10,000, the Senate Judiciary Committee explained that "the amount should be fixed at a sum of money that will make jurisdiction available in *all substantial controversies* where other elements of Federal jurisdiction are present." S. Rep. No. 1830, 85th Cong., 2d Sess. 3-4 (1958) (emphasis added). The Committee added that "[t]he jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." *Id.* at 4. Similarly, when Congress increased the jurisdictional amount in 1996 from $50,000 to $75,000, the Senate Judiciary Committee, after noting "the importance of balancing the need to assist the Federal judiciary in reducing its increasing caseload with the needs of those making use of our Federal courts," concluded that "[t]he adjustment of the jurisdictional amount provides claims with substantial amounts at issue access to a Federal

[5] Congress has understood the requirement as serving both to preserve the role of the state courts and, in the modern era, to avoid overburdening the federal courts. See, *e.g.*, Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 302-318 (1985).

forum." S. Rep. No. 366, 104th Cong., 2d Sess. 29-30 (1996).

The purpose of the diversity jurisdiction statute, including its amount-in-controversy requirement, is thus to provide a neutral national forum for the adjudication of substantial controversies involving diverse parties. That purpose is fully served only when the federal courts are open to cases satisfying the jurisdictional amount from the perspective of either party. After all, "the matter in controversy" is equally "substantial" whether the potential benefit to the plaintiff is more than $75,000 or the potential cost to the defendant is more than $75,000. As a leading treatise has observed, "the purpose of a jurisdictional amount in controversy requirement—to keep trivial cases away from the federal court system—is satisfied when the case is worth a large sum of money to either party." 14B Charles A. Wright et al., *Federal Practice and Procedure* § 3703, at 124 (1998); accord 15 *Moore's Federal Practice*, *supra*, § 102.109[3], at 102-199.

In addition, measuring the amount in controversy from the perspective of either party promotes the symmetry that Congress has sought to achieve between out-of-state plaintiffs and out-of-state defendants with respect to access to federal court in diversity cases. Congress could have left it solely to the plaintiff, as the master of its complaint, to decide whether a substantial dispute between diverse parties would be adjudicated in state or federal court. Instead, beginning with the Judiciary Act of 1789, Congress gave out-of-state defendants (and sometimes all defendants) the right to remove such cases to federal court. See 28 U.S.C. 1441; *Saint Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 286-287 (1938) (discussing history of removal statute). The removal statute clearly indi-

cates concern for the out-of-state defendant, who otherwise would have no control over the forum. Yet, if the amount in controversy were measured only from the plaintiff's perspective, a defendant could not remove the case to federal court, even though the defendant stood to lose more than the jurisdictional amount from an adverse state court judgment. That would be so even in those cases where either party might have initiated a suit, so that it is merely fortuitous which party is the plaintiff and which is the defendant.

The "either perspective" rule also has practical advantages. Under a "plaintiff only" rule, plaintiffs could demonstrate the value of the case from their own perspective, and thus based on information available to them; defendants, however, could demonstrate the value of the case only from their adversary's perspective, and thus based on information that might not be available to them early in the case when removal must occur. See 28 U.S.C. 1446(b) (time limits for removal); see also McInnis, *supra*, 6 Geo. Mason L. Rev at 1023 (suggesting that valuing the amount in controversy from either party's perspective avoids "forcing courts to accept a one-sided, and hence distorted, assessment of the value of a claim"). Forcing defendants to rely on information outside their possession is particularly problematic in the removal context, in which the removing defendant bears the burden of establishing jurisdiction. *Carson* v. *Dunham*, 121 U.S. 421, 425 (1887). In addition, it may be easier in some cases to value the injunction from the defendant's perspective. While the value of the injunction from a plaintiff's perspective may involve difficult valuation problems (*e.g.*, what is the value of not having a pipeline under your land?), the defendant's costs of compliance may be relatively concrete.

C. This Court Has Measured the Amount in Controversy from Either Party's Perspective, and the Trend Among Lower Courts and Commentators Favors That Approach

This Court has recognized that, in cases seeking injunctive or other equitable relief, "the matter in controversy" may have a different value to the plaintiff and the defendant. In *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121, 124-125 (1915), for example, the plaintiff sought an injunction that would have required the defendant to relocate its utility poles and wires—relief that would have produced a benefit to the plaintiff exceeding the $3000 jurisdictional amount, but which would have cost the defendant no more than $500. Although the Court held in that case that the amount-in-controversy requirement was satisfied based on the value to the plaintiff of obtaining the requested injunction, see *id.* at 124, the Court has not held that the requirement cannot also be satisfied based on the value to the defendant of defeating the injunction.

Indeed, in *Market Co.* v. *Hoffman*, 101 U.S. 112 (1879), this Court considered the amount in controversy from the defendant's perspective in applying an 1879 statute that, in terms similar to those of the diversity jurisdiction statute, authorized appeals to this Court from the Supreme Court of the District of Columbia "in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars." Act of Feb. 25, 1879, ch. 99, § 4, 20 Stat. 321. In that case, 206 persons who occupied stalls in the defendant's market successfully sued to enjoin the defendant from selling the stalls to a third party. The Court concluded that the $2500 amount-in-controversy

requirement was satisfied because "the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than $60,000." 101 U.S. at 113.

In many subsequent cases, the Court has described the amount-in-controversy inquiry for federal jurisdiction in terms that would permit consideration of the value of the case from either party's perspective. Thus, in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Court observed that, "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation," *id.* at 347, without suggesting that only the value to the plaintiff is to be considered. See, *e.g.*, *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936) ("jurisdiction is to be tested by the value of the object or right to be protected against interference"); *Hunt* v. *New York Cotton Exch.*, 205 U.S. 322, 336 (1907) ("jurisdiction is determinable by the object sought to be accomplished"); *Mississippi & Missouri R.R.* v. *Ward*, 67 U.S. (2 Black) 485, 492 (1862) ("the removal of the obstruction [a bridge] is the matter of controversy, and the value of the object must govern"). The Court has gone so far as to observe, albeit in dicta, that "the pecuniary value of the matter in dispute may be determined * * * by the pecuniary result to one of the parties immediately from the judgment." *Smith* v. *Adams*, 130 U.S. 167, 175 (1889).

A number of lower courts have recognized that, in cases seeking injunctive or other equitable relief, "the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." *Ronzio* v. *Denver & Rio Grande Western R.R.*, 116 F.2d 604, 606 (10th Cir. 1940); see, *e.g.*, *Sanchez* v. *Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th Cir. 1996); *Oklahoma Retail Grocers Ass'n* v. *Wal-Mart Stores, Inc.*, 605 F.2d 1155, 1159-1160 (10th Cir. 1979); *McCarty*, 595 F.2d at 393-395; *Smith* v. *Washington*, 593 F.2d 1097, 1100 & n.6 (D.C. Cir. 1978); *Berman* v. *Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969); *Government Employees Ins. Co.*, v. *Lally*, 327 F.2d 568, 569 (4th Cir. 1964); *Ridder Bros.* v. *Blethen*, 142 F.2d 395, 398-399 (9th Cir. 1944); cf. *Ericsson GE Mobile Communications, Inc.* v. *Motorola Communications & Elec., Inc.*, 120 F.3d 216, 220 & n.15 (11th Cir. 1997) (recognizing that "there are persuasive arguments to support the adoption of the either-viewpoint rule" but adhering to contrary circuit precedent). The leading commentators, as well, have suggested that the amount in controversy is more appropriately measured from the perspective of either party in cases seeking injunctive relief. See, *e.g.*, 14B Wright et al., *supra*, § 3703, at 125 (observing that the "either perspective" rule "seems to be the appropriate one"); 15 *Moore's Federal Practice*, *supra*, § 102.109[3], at 102-199; Chemerinsky, *supra*, § 5.3, at 292 (observing that "the trend seems to be" in the direction of the "either perspective" rule).

II. THERE IS NO BASIS FOR ADOPTING A DIFFERENT RULE IN THE CLASS ACTION CONTEXT

The court below has applied the "either perspective" rule in conventional single-plaintiff, single-defendant cases for decades. See, *e.g.*, *Ridder Bros.*, 142 F.2d at 399. Nonetheless, the court concluded that application of the "either perspective" rule was foreclosed in the class action context by this Court's decisions in *Snyder*

v. *Harris*, 394 U.S. 331 (1969), and *Zahn* v. *International Paper Co*, 414 U.S. 291 (1973). On the contrary, the "either perspective" rule, properly applied, is more consistent with *Snyder* and *Zahn* than the court's own approach.

A. Measuring the Amount in Controversy by the Benefit or Cost of an Injunction Running to One Class Member Assures that Aggregation Neither Expands nor Contracts the Jurisdiction of the Federal Courts

In a case seeking injunctive or other equitable relief with respect to the class as a whole, the amount-in-controversy analysis should turn on whether, in a hypothetical suit between one plaintiff and one defendant, the cost to the plaintiff of obtaining the relief or the cost to the defendant of providing it would exceed the jurisdictional amount. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997) (Posner, C.J.) (to measure the amount in controversy from the defendant's perspective in a class action seeking injunctive relief, "[t]he test * * * is the cost to each defendant of an injunction running in favor of one plaintiff"), cert. denied, 522 U.S. 1153 (1998). That analysis assures that aggregation of claims through the procedural device of a class action does not deprive parties of the access to federal court to which they would be entitled if the claims were brought individually. It likewise assures that aggregation of claims does not provide parties with access to federal court to which they would otherwise not be entitled.

1. Applying the "either perspective" rule to class actions by considering the value of an injunction running from one plaintiff to one defendant in a hypothetical individual suit comports with the "nonaggregation rule" of *Snyder* and *Zahn*. In those cases, the Court

held that class members could not aggregate their "separate and distinct claims" for damages in order to satisfy the jurisdictional amount. Thus, the class action in *Snyder* could not proceed in federal court at all, because no class member's individual claim exceeded the jurisdictional amount, whereas the class action in *Zahn* could proceed only as to those class members whose individual claims exceeded that amount. The Court explained that allowing aggregation of claims that could not have been brought in federal court separately would "seriously undercut the purpose of the jurisdictional amount requirement." *Snyder*, 394 U.S. at 340; accord *Zahn*, 414 U.S. at 301.[6]

As the Seventh Circuit explained, the "nonaggregation rule" is not violated when the amount-in-controversy analysis focuses on the benefit or cost of an injunction running from one defendant to plaintiff, because "each plaintiff's claim [is] held separate from each

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[6] The lower courts are divided over whether *Zahn*'s requirement of dismissal of class members' claims that do not satisfy the jurisdictional amount survives Congress's subsequent enactment of the supplemental jurisdiction statute, 28 U.S.C. 1367. See *Rosmer* v. *Pfizer Inc.*, 263 F.3d 110, 114 (4th Cir. 2001) (noting controversy), petition for cert. pending, No. 01-1390 (filed Mar. 14, 2002). Section 1367(a) provides, subject to specified exceptions, that

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. 1367(a).

other plaintiff's claim from both the plaintiff's and the defendant's standpoint." *Brand Name*, 123 F.3d at 610. Each such claim must satisfy the jurisdictional amount, either from the plaintiff's perspective or the defendant's perspective, in order to come within the federal courts' diversity jurisdiction. Thus, no plaintiff and no defendant would be entering federal court by "rid[ing] on another's coattails." *Zahn*, 414 U.S. at 301.

2. Such an application of the "either perspective" rule not only ensures, consistent with *Snyder* and *Zahn*, that the class action device does not create jurisdiction by allowing claims that could not be adjudicated individually in federal court to be adjudicated collectively. It also avoids the converse problem by ensuring that plaintiffs cannot defeat jurisdiction by aggregating, through the class action device, claims that could be brought individually in federal court.

If, for example, a plaintiff brought an individual suit seeking injunctive relief, which would result in a benefit of $25,000 to the plaintiff but a cost of $100,000 to the defendant, the amount-in-controversy requirement would be satisfied. In the Ninth Circuit, however, if that same plaintiff sought the same relief on behalf of a class of 100 similarly situated individuals, federal jurisdiction would be lacking, because the "either perspective" rule could not be applied in a class action and each plaintiff stood to gain only $25,000. There is no plausible reason why the decision to file a class suit rather than an individual suit (or 100 separate individual suits) should defeat federal jurisdiction.[7]

[7] The logic of the Ninth Circuit's approach would suggest that the consolidation of 100 separately filed actions, each one properly in federal court, would require the dismissal of the action for lack of jurisdiction. See Pet. App. 8a ("logic would dictate that [the rule for class actions] should apply to all multi-party complaints").

Such a result is incompatible with the reasoning of *Snyder* and *Zahn*, as well as with the broader principle that federal procedural rules should not trump statutory provisions. Just as the class action device should not be understood to expand Congress's grant of diversity jurisdiction, as the Court recognized in *Snyder* and *Zahn*, the class action device should not be understood to contract Congress's grant of diversity jurisdiction. Indeed, the Court in *Snyder* expressly rejected the notion that anything in Rule 23 could have altered "the scope of the congressionally enacted grant of jurisdiction to the district courts." 394 U.S. at 336. The Court noted that any contrary understanding of Rule 23 "would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend *or limit* the jurisdiction of United States district courts.'" *Id.* at 337 (quoting Fed. R. Civ. P. 82) (emphasis added).

Indeed, Rule 23(b)(2), one of the provisions on which respondents relied in seeking class certification in this case, specifically provides for class actions when a defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In Rule 23(b)(2) class actions, in contrast to Rule 23(b)(3) class actions based only on a common question of law and fact, the court is not required to find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The absence of such a requirement under Rule 23(b)(2) indicates that the drafters of the Rules understood that a class action ordinarily would be the optimal means of

adjudicating claims for injunctive and declaratory relief with respect to a class as a whole. See 7A Charles A. Wright et al., *Federal Practice and Procedure* § 1775, at 447 (1986) (observing that "[c]lass action treatment is particularly useful in this situation because it will determine the propriety of the behavior of the party opposing the class in a single action"). It would be contrary to that understanding to construe the amount-in-controversy requirement in a manner that could allow such claims in federal court when they are pursued individually, but not in a class action.

Here, for example, suppose that one respondent filed suit against petitioners, seeking the same relief that was sought in the consolidated complaint, including an injunction requiring petitioners to reestablish the rebate program. See Consolidated Complaint 13 (requesting "specific performance of the Rebate Program to plaintiffs and class members"). Such a suit would satisfy the amount-in-controversy of Section 1332, provided that the cost to each petitioner of complying with the injunction exceeded $75,000, and thus could be filed in or removed to federal court. The mere fact that respondents chose to sue collectively, rather than individually, should not operate to defeat federal jurisdiction.

3. It will often be appropriate in a class action to consider the defendant's cost of compliance with the requested injunction for an additional reason. In *Snyder* and *Zahn*, the Court contrasted the plaintiffs' claims for individual damages in those cases with plaintiffs' claims in other cases for the establishment of a common fund. The Court observed that, "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Zahn*, 414 U.S. at 294; accord *Snyder*, 394 U.S. at 335.

The distinction articulated in *Snyder* and *Zahn* is also applicable to many claims for injunctive and other equitable relief. As the Seventh Circuit explained, in analyzing a class claim for injunctive relief, as in analyzing a class claim for damages, a court must determine "whether each plaintiff is asserting an individual right or, rather a right to an undivided interest in something." *Brand Name*, 123 F.3d at 610. Thus, if the class would have "a common and undivided interest," *Zahn*, 414 U.S. at 294, in the injunction, the amount-in-controversy inquiry turns on the defendant's total costs of compliance. See *Market Co.*, 101 U.S. at 113 (considering defendant's total cost of compliance with injunction providing common relief to multiple plaintiffs), Because Rule 23(b)(2) authorizes class actions seeking injunctive relief against a defendant who "has acted to refused to act on grounds generally applicable to the class," much of the injunctive relief sought in class actions may be of the "common and undivided" variety. Of course, because of the "common and undivided" nature of such an injunction, the cost to the defendant of an injunction running to the class would be the same in many (but not all) cases as the cost of an identical injunction running to one plaintiff.

Arguably, the injunction sought in this case, which would require petitioners to reestablish the rebate program so that all class members could resume accruing rebates, would enforce a common and undivided interest. In any event, however, because the cost of providing the requested relief to any one plaintiff exceeds the $75,000 jurisdictional amount, the Court need not definitively characterize the relief sought here.

B. Measuring the Amount in Controversy in a Class Action by the Cost of an Injunction to the Defendant Promotes Fairness and Judicial Economy

A rule that enables class actions to be filed in, or removed to, federal court based on the amount in controversy to either side provides several practical advantages.

First, in class actions, as in other cases, diversity jurisdiction assures the parties of a neutral national forum. To be sure, some have questioned whether state court bias against out-of-state parties continues to exist in the modern era. See, *e.g.*, *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting). Concerns about such bias nonetheless persist among out-of-state parties, especially defendants, with experience litigating in state courts. See, *e.g.*, *The Federal Courts Improvement Act: Hearing on S. 1101 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 48 (1995) (*Senate Judiciary Hearing*) (spokesperson for American Bar Association observes that, "while it has been suggested that there are no more prejudices" against out-of-state litigants, "trial lawyers know different"); *id.* at 56 (spokesperson for Defense Research Institute observes that "[o]ur members, who often represent controversial or unpopular defendants, can confirm from personal experience that bias still exists" against out-of-state parties). The Constitution and diversity jurisdiction statute view with "indulgence the possible fears and apprehensions of suitors" without regard to the actual extent of local bias. *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) at 87.

Those concerns may be exacerbated in the context of a class action. In that context, a defendant may face the

aggregation of literally thousands of actions as well as unique pressures to settle before a final determination on the merits. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.), cert. denied, 516 U.S. 867 (1995); Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Second, aside from any question of bias against out-of-state parties, a state court may not have the same expertise or the same resources as a federal court for handing class actions and other complex cases. See Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 481-482 (2000) (noting arguments that "state court judges, who historically have had far fewer resources at their commend, are ill-equipped to provide the kind of close attention that class actions require"); McInnis, *supra*, 6 Geo. Mason L. Rev. at 1027 (noting the perception that "federal courts, with more experienced judges and less crowded dockets, are better positioned to decide complex cases").

In federal court, moreover, the parties have the benefit of the federal Judicial Code, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence, which provide uniform national rules for the "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. See *Senate Judiciary Hearing* 57 (spokesperson for Defense Research Institute notes that "multi-state litigation relating to similar claims" benefits from "the procedural consistency provided by the Federal Rules of Evidence and Federal Rules of Civil Procedure"). For example, under recent amendments to Federal Rule of Civil Procedure 23, federal court litigants enjoy relatively liberal rules permitting interlocutory appeals of orders granting or denying class certification. See Fed. R. Civ. P. 23(f).

As a result of the perceived advantages of a federal forum, the trend in recent legislative proposals has been to expand access to the federal courts in class actions that involve significant financial risk for the defendant. See Br. in Opp. App. 1a-24a, 25a-45a.

Third, federal jurisdiction provides particular efficiencies where, as here, several similar suits are pending against the same defendant. If such cases can be filed in or removed to federal court, they can also be transferred to a single district court for consolidated or coordinated pretrial proceedings. See 28 U.S.C. 1407; see also 28 U.S.C. 1404(a) (allowing a case to be transferred, "[f]or the convenience of the parties and witnesses, in the interest of justice" to any other district "where it might have been brought"); cf. *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (court to which related case is transferred under 28 U.S.C. 1407 cannot invoke 28 U.S.C. 1404(a) to assign case to itself for trial). Such transfers reduce the costs and other burdens of overlapping litigation. For example, when a single federal court is overseeing discovery, parties will not be subject to multiple, and potentially conflicting, discovery schedules, rulings, and obligations. The opportunities for a comprehensive settlement of the dispute are also enhanced when all interested parties are before one court.

Finally, although 28 U.S.C. 1407 does not provide for a consolidated or coordinated trial, parties may have an incentive, once related cases have been transferred to a single district court for pretrial proceedings, to consolidate the case for trial. Here, for example, respondents elected, after the transfer to the Western District of Washington, to file a single consolidated complaint. As commentators have observed, "[b]eyond the sheer economy of not having to litigate the same matters

twice, consolidation of related proceedings can reduce such problems as inconsistent outcomes, whipsawing (from the ability of defendants in separate litigations to point to a nonparty as the one truly liable), and uncoordinated scrambles for the assets of a limited fund." Thomas D. Rowe Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7, 14-15 (1986) (quoted in ALI, *Complex Litigation: Statutory Recommendations and Analysis* 16 (1994)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. McCAULEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED BY THE COURT

Whether there is appellate jurisdiction when Petitioners, as the nominally prevailing party in the district court,[1] appeal the district court's dismissal of a complaint for lack of subject matter jurisdiction.

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1. Respondents/Plaintiffs do not understand as a factual matter how Petitioners are a nominally prevailing party in the district court. Other than the order appealed from, the only other order entered by the district court relevant to the issue here was one denying Petitioners' motion to dismiss the consolidated complaint under Fed. R. Civ. P. 12(b)(6). J.A. 110. In contrast, the dismissal of the consolidated complaint was done by the district court *sua sponte*, after briefing on class certification, and was unrelated to Petitioners' motion.

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RESPONDENTS' SUPPLEMENTAL STATEMENT

In each of the underlying actions, Plaintiffs filed their cases under state law asserting state law claims. Petitioners removed each case to federal court and petitioned the Judicial Panel on Multidistrict Litigation ("MDL Panel") to consolidate the cases for pretrial proceedings under 28 U.S.C. § 1407. J.A. 109. The MDL Panel granted the petition, plaintiffs consented to the transfer, and all cases were transferred to the Western District of Washington. J.A. 31-32.

In the Case Management Order proposed by the parties, the district court noted that the cases were "consolidated for pretrial purposes," and ordered that "a consolidated complaint" — if one was to be filed — must "be filed within fifteen (15) days after this Order becomes effective." J.A. 41, 44. To streamline the pretrial proceedings, Plaintiffs filed a single, consolidated complaint. J.A. 70.

After class discovery, and following two initial hearings, *sua sponte* the district court issued an order to show cause why the action should not be dismissed for lack of jurisdiction and why the six original cases "should not be . . . remanded to state court." J.A. 66. On October 29, 1999, the district court found that it lacked subject matter jurisdiction over the claims in the consolidated complaint, which it therefore dismissed, J.A. 91-101, and it then remanded to state court each of the six actions originally filed in state court and removed to federal court by Petitioners. J.A. 100-101.

The district court dismissed the consolidated complaint and indicated an intention to dispose of the federal action while remanding the cases back to their original state courts. J.A. 100-101, 124-126. Thus, the court of appeals concluded that the district court's decision was reviewable under 28 U.S.C. § 1291. J.A. 111-112.[2]

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2. The district court's order remanding the state actions is not before this Court, and the panel below concluded that it was not reviewable. J.A. 126.

The Ninth Circuit affirmed the dismissal of the consolidated complaint for lack of jurisdiction. The panel confirmed that it had jurisdiction to review the district court's order, which the panel construed as dismissing the consolidated action. J.A. 111-112.

SUMMARY OF ARGUMENT

Courts cannot review an order of remand that is based on a lack of subject matter jurisdiction. 28 U.S.C. § 1447(d). Courts do have the authority to review dismissals of actions, even those that are based on subject matter jurisdiction. Accordingly, if this Court concludes as the panel did that appellate jurisdiction is based on the dismissal of the consolidated action, even though it is predicated solely on lack of subject matter jurisdiction, then appellate jurisdiction may be proper.

ARGUMENT

I. IF THE COURT DETERMINES THAT THE APPEAL WAS A REVIEW OF A REMAND ORDER, APPELLATE JURISDICTION IS LACKING

A district court must remand a removed action when it appears to the court that it lacks subject matter jurisdiction. 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded").[3] Indeed, the Court has observed that "'the literal words of § 1447(c) . . . give . . . no discretion to dismiss rather than remand an action.' The statute declares that, where subject matter jurisdiction is lacking, the removed case 'shall be remanded.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (citation omitted).

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3. *See also* Fed. R. Civ. P. 12(h)(3) ("Whenever its appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.")

The very next subsection of the removal statute appears to bar all appellate review of remand orders. 28 U.S.C. § 1447(d) (except civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . ."). However, this Court has also stated "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself." *Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 345 (1976). Thus, there are at least some remand orders that are reviewable. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (permitting review of remand order because the "District Court's abstention based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.")

Nevertheless, the interplay and command of section 1447(c) and 1447(d) are clear when a remand is based on a finding that the district court lacks subject matter jurisdiction.

> Title 28 U.S.C. § 1447(c) provides for remanding a removed action when the district court determines that "the case was removed improvidently and without jurisdiction"; and when a remand has been ordered on these grounds, 28 U.S.C. § 1447(d) unmistakably commands that the order "remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723, 723 (1977). As the Court explained in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered v. Petrarca*,

516 U.S. 124, 127 (1995). And, more recently, the Court reaffirmed this principle, emphatically stating:

> As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).

Id. at 127-28. This bright-line rule applies "no matter how plain the legal error." *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977).

The purpose of denial of any review of remand orders is to prevent delay of the litigation that the removing party may achieve by seeking appellate reconsideration of a remand order. *United States v. Rice*, 327 U.S. 742, 751-52 (1946).

> There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court.

Thermtron, 423 U.S. at 351 (citation omitted). In a very real sense, delay is exactly what Petitioners have already achieved. Other than one motion to remand that was withdrawn, Plaintiffs have never opposed any court, be it state or federal court, to hear the underlying claims; they simply desire them to proceed.

Here, because the district court's "remand order was plainly within the bounds of § 1447(c)"[4] — indeed remand was

4. Even if the Court were to construe the remand order as one made pursuant to R.P.J.P.M.L. 7.6, section 1447(d) would still apply. Section 1447(d) applies "not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well." *United States v. Rice*, 327 U.S. at 752.

specifically made because the court found it lacked subject matter jurisdiction — the remand order is "unreviewable by the Court of Appeals, by mandamus or otherwise." *Thermtron*, *supra*; *Gravitt*, *supra*; *Things Remembered*, *supra*; *Morey v. Lockhart*, 123 U.S. 56 (1887); *Board of Managers of 2900 Ocean Ave. Condo. v. Bronkovic*, 83 F.3d 44 (2d Cir. 1996); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742 (3d Cir. 1995); *Robertson v. Ball*, 534 F.2d 63 (5th Cir. 1976); *Anusbigian v. Trugreen/Chemlawn*, 72 F.3d 1253 (6th Cir. 1996); *Carney v. BIC Corp.*, 88 F.3d 629 (8th Cir. 1996); *Archuleta v. Lacuesta*, 131 F.3d 1359 (10th Cir. 1997); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986).

II. IF THE COURT DETERMINES THAT THE APPEAL WAS A REVIEW OF THE DISMISSAL OF THE CONSOLIDATED ACTION, THEN THERE IS APPELLATE JURISDICTION

Here, the district court dismissed the consolidated action before remanding the actions back to their respective state courts. Leaving aside for one moment the reason for the district court's dismissal was for finding a lack of subject matter jurisdiction — one of the two reasons specified by Congress in section 1447(c) — this Court has held that dismissal of an action that precedes an order of remand is reviewable.

> [N]o appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. . . . We are of the opinion that the petitioner was entitled to have the Circuit Court of Appeals determine whether the dismissal of its cross-action . . . was proper.

Waco v. United States Fidelity & Guar. Co., 293 U.S. 140, 143 (1934). In *Waco*, the Court permitted review of the dismissal but not the order of remand. Moreover, the Court

did so to determine whether the dismissal of the cross-action against Fidelity was valid because the substantive decision in the district court was binding on the parties. *Id.* Similarly, courts have found appellate jurisdiction to review some remand orders when that review is predicated on a prior order that is reviewable. *See, e.g., Carr v. American Red Cross*, 17 F.3d 671, 682-83 (3d Cir. 1994); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984).

Accordingly, the panel was at least plausibly correct in asserting jurisdiction over the appeal as the district court dismissed the consolidated action. Specifically, the district court stated: "The consolidated complaint is hereby dismissed for lack of jurisdiction, and the six cases originally filed in state court, and removed to federal court by the defendants, are now remanded to state court . . ." J.A. 100. Of course, courts of appeal routinely review dismissals for subject matter jurisdiction. *See, e.g., Budget Rent-A-Car Inc. v. Higashiguchi*, 109 F.3d 1471 (9th Cir. 1997).

At the same time, Petitioners did not appeal the substantive decision on the merits of the action denying the motion to dismiss; instead, Petitioners appealed the dismissal of the consolidated action for lack of jurisdiction and remand order. This distinction seems to take this case out of the *Waco* line of decisions, as there is no substantive decision on the merits to review or any threat that some order of the court will be unreviewable at a later date. Furthermore, Plaintiffs are hard pressed to find any reason why appellate jurisdiction should be found here because historically courts were permitted to *dismiss or remand* the action to state court for lack of jurisdiction, as either decision achieves the same result without impacting the merits of the case. Indeed, as this Court has noted, "Section 1447(d) has its roots in the Act of Mar. 3, 1887, 24 Stat. 552. Prior to 1875, orders of remand were not reviewable by appeal or writ of error for want of a final judgment." *Thermtron*, 423 U.S. at 346. However, in 1875,

Congress enacted Section 5 of the Judiciary Act of 1875, 18 Stat. 472, which provided:

> That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but *shall dismiss the suit or remand it to the court from which it was removed* as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court *dismissing or remanding* said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

(Emphasis added). Subsequently, in 1887, Congress repealed the provision contained in Section 5 of the 1875 Act providing for appellate review of and included a new provision that forbid review of remand orders. Specifically, The Act of Mar. 3, 1887, c. 373, 24 Stat. 553, provided in part:

> Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of

> error from the decision of the circuit court so remanding such cause shall be allowed.

Thus, "while not disturbing the provision for *dismissal or remand* for want of jurisdiction, [the Act] not only repealed the provision in § 5 of the 1875 Act providing for appellate review of remand orders but contained a provision that 'improperly removed' cases should be remanded" and that "no appeal or writ of error *from the decision* of the circuit court *so remanding* such cause shall be allowed." *Thermtron*, 423 U.S. at 346-47 (emphasis on "so remanding" in original, otherwise emphasis added).

The statutory history thus indicates that Congress has determined no review of the decision remanding the action is permissible when that decision is based on a lack of subject matter jurisdiction. The only question then is whether Congress intended to permit review of a *dismissal* for lack of subject matter jurisdiction when that dismissal is included with the decision to remand and is based on the very same grounds. Respectfully, and as much as Plaintiffs would like the Court to provide clear guidance on the amount-in-controversy issue presented, Plaintiffs cannot think of a good reason to permit such review. Indeed, an exception to permit review of dismissals based on subject matter jurisdiction when included in the same order as a remand order would swallow the rule and, contrary to Congress' intent, permit review of a remand decision based on the lack of subject matter jurisdiction. *See Liberty Mutual*, 48 F.3d at 748-49.

III. THE CONSOLIDATED COMPLAINT DOES NOT SUPERCEDE THE STATE-COURT ACTIONS

Petitioners erroneously contend that the consolidated complaint "supercedes the state-court actions." *See, e.g.*, Pet. Reply at 19. When the MDL panel transferred the cases to the Western District of Washington, it specifically instructed the district court to conduct "coordinated or consolidated pretrial proceedings with the action pending there." J.A. 32.

Indeed, such an Order is required when cases are transferred pursuant to 28 U.S.C. § 1407, as *pretrial* proceedings are all that Congress permits the transferee court to conduct in MDL proceedings. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). At the close of pretrial proceedings, the transferred cases *must* be remanded by the transferee court. *Id.* Although plaintiffs filed a "consolidated" complaint as expressly permitted by 28 U.S.C. § 1407, this streamlining did not, and could not, expand the jurisdiction of the district court or any court.

Petitioners' citation to *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272 (E.D. Mo. 1996), is inapplicable as: (i) all of the claims at issue were brought under federal antitrust law, and hence federal jurisdiction was not an issue; and (ii) that decision was a substantive dismissal (i.e., *on the merits*) which was therefore dispositive of the claims. Furthermore, *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 780-81 (9th Cir. 1994), is equally inapplicable, because there the court was concerned with whether the consolidated class complaint joined all actions into a single action to thus make them removable *as a group*. Here, Petitioners' use of the citation goes to authority to review the issuance of a remand order. Indeed, the panel considered and repudiated Petitioners' argument stating:

> Ford and Citibank begin their argument with the premise that a consolidated complaint is "akin to an amended complaint," which "supersedes the original, the latter thereafter being treated as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). They thus contend that the consolidated complaint amended the original state complaints, rendering them "non-existent." However, they provide no authority for this proposition. The cases on which they rely merely stand for the unremarkable propositions that: (1) an amended complaint supersedes an original and (2) in a

consolidated action, a consolidated complaint is the operative pleading and supersedes all previously filed complaints. No authority supports the contention that a consolidated complaint touches or disturbs underlying state claims.

Nor is there anything cited to us in the record that demonstrates the district court meant for the complaints in the remand cases to disappear. On the contrary, the plaintiffs "consolidate" their efforts into one document which becomes the operative pleading. No court order did anything more than this. Once that umbrella complaint was dismissed, it left the underlying state removed complaints intact. Therefore, the district court did not exceed its authority in remanding the underlying removed actions to state court and, pursuant to section 1447(d), we lack jurisdiction to review its decision.

J.A. 126. There is nothing, by virtue of filing a consolidated complaint, that extinguishes the underlying state law complaints, nor could any order issued by a federal court without subject matter jurisdiction do so.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. MCCAULEY *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Is there appellate jurisdiction when petitioners, as the nominally prevailing party in the district court, appeal the district court's dismissal of the complaint for lack of subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock. Citibank (South Dakota), N.A., is a wholly-owned subsidiary of Citibank, N.A., and is indirectly wholly-owned by Citigroup Inc. Citigroup Inc. is a publicly held company.

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PETITIONERS, THOUGH NOMINALLY PREVAILING IN THE DISTRICT COURT, MAY APPEAL THE DISMISSAL OF THE CONSOLIDATED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION 3

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APPENDIX A: Letter from Steve W. Berman, respondents' counsel of record, to Denise McNerney, Merits Clerk, Supreme Court of the United States, dated September 13, 2002. ..... 1a

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INTRODUCTION

This case began as six different state court actions filed against one or both petitioners. Invoking the protection of the diversity statute, petitioners removed the cases to federal court. The cases were then transferred and consolidated in the Western District of Washington pursuant to the multidistrict litigation statute. Following transfer, respondents voluntarily filed a single federal Consolidated Complaint that differs significantly from the underlying state court complaints and affirmatively asserts federal diversity jurisdiction.[1]

Following pleading, discovery, and motions practice regarding class certification and dismissal, the district court *sua*

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[1] Although named as a defendant in the Consolidated Complaint, petitioner Citibank was not a defendant in three of the state court actions. *Compare* J.A. 51 *with* complaints in *Copeland* v. *Ford Motor Co.*, No. CV-97-970, ¶ 2 (Ala. Cir. Ct. filed Sept. 2, 1997) ("Ala. Compl."); *Essig* v. *Ford Motor Co.*, No. 97-18514, ¶ 5 (N.Y. Sup. Ct. filed Aug. 1, 1997) ("N.Y. Compl."); *and La Grou* v. *Ford Motor Co.*, No. BC180583, ¶ 2 (Cal. Super. Ct. filed Oct. 31, 1997) ("Cal. Compl."). In addition, the Consolidated Complaint does not include as parties any of the named plaintiffs from two of the state court actions. *Compare* J.A. 50-51 *with* Ala. Compl. ¶ 1 *and* complaint in *Merrick* v. *Ford Motor Co.*, No. 9708-06079 (Or. Cir. Ct. filed Aug. 4, 1997) ("Or. Compl."). Only two state court complaints sought specific performance of the Rebate Program (which they sought only as an alternative to compensatory damages), *see* complaint in *Hornreich* v. *Ford Motor Co.*, No. 97-2-16935, Prayer for Relief (Wash. Super. Ct. filed July 7, 1997) ("Wash. Compl."); Or. Compl. ¶¶ 1-12, and one disclaimed injunctive relief altogether, *see* Ala. Compl. ¶ 9. The Consolidated Complaint alleges three causes of action—breach of contract, violation of consumer protection statutes, and unjust enrichment, *see* J.A. 57-62; not all state court complaints asserted such claims, *see, e.g.*, N.Y. Compl. ¶¶ 20-30; Cal. Compl. ¶¶ 1-26; complaint in *McCauley* v. *Ford Motor Co.*, No. 97L 008315, Counts I, II (Ill. Cir. Ct. filed July 14, 1997). Moreover, several state court complaints alleged claims abandoned by the Consolidated Complaint; for example, plaintiffs in the California action asserted a promissory estoppel claim and plaintiffs in the Washington action asserted a conspiracy claim. *See* Cal. Compl. ¶¶ 24-26; Wash. Compl. ¶¶ 57-60. Petitioners understand that these complaints are part of the underlying record in the Court's possession, but will lodge them upon request.

sponte (and over petitioners' opposition) dismissed the Consolidated Complaint for failure to satisfy the amount-in-controversy requirement. Unless reversed, the district court's order means that state court actions will proceed, unconsolidated, in several different States, leaving petitioners with substantial additional burdens and no recourse to the protections the diversity statute affords to out-of-state litigants.

On those facts, the question the Court has now asked the parties to brief can fairly be phrased as follows: whether the district court's determination that petitioners are not entitled to adjudication of respondents' Consolidated Complaint in a single federal forum, but instead must face multiple suits in home-state-court forums, imposed an injury on petitioners sufficient to sustain appellate jurisdiction. Viewed that way, appellate jurisdiction follows as a matter of course.

Respondents effectively concede as much, going so far as to contend that petitioners did not even "prevail" in the district court, because petitioners "urged the court to retain jurisdiction, and the district court declined to do so."[2] While it is in fact correct to say, as the Court's question reflects, that petitioners "prevailed" in the sense that the complaint against them was dismissed, it is equally correct to say, as the Court's question also reflects, that petitioners' "victory" was "nominal[]" at best. "Pyrrhic" is an apt description.

This Court's cases uniformly recognize that a party may appeal a judgment nominally in its favor, where, as here, that judgment also imposes some detriment sufficient to create a genuine "stake in the appeal." If petitioners are correct in their view of the principal question of diversity jurisdiction presented here, the judgment of dismissal in this case deprived them of their right to litigate this case to a final adjudication in federal court. That deprivation plainly constitutes a sufficient stake to sustain appellate jurisdiction.

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[2] *See* Letter from Steve W. Berman, respondents' counsel of record, to Denise McNerney, Merits Clerk, Supreme Court of the United States, dated September 13, 2002 (App. 1a).

ARGUMENT

PETITIONERS, THOUGH NOMINALLY PREVAILING IN THE DISTRICT COURT, MAY APPEAL THE DISMISSAL OF THE CONSOLIDATED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

1. It is common ground that "appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court." *United States* v. *Jose*, 519 U.S. 54, 57 (1996) (per curiam). Instead, "[f]ederal appellate jurisdiction is limited by the appellant's personal stake in the appeal." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980). Even a party that has "prevailed on the merits" may be sufficiently aggrieved by the district court's judgment to "retain[] a stake in the appeal." *Id.* at 333-34; *see also Forney* v. *Apfel*, 524 U.S. 266 (1998); *Jose*, 519 U.S. at 57; *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939). That is so because a party may "prevail" below, but still receive less than "all that he has sought." *Roper*, 445 U.S. at 333.

Thus the question presented is not answered by the mere fact that petitioners were the "nominally prevailing party" in the district court. The dispositive issue is whether petitioners have a "sufficient stake in the appeal," notwithstanding dismissal of the case. The answer to that question is yes.[3]

In *Deposit Guaranty National Bank* v. *Roper*, this Court concluded that plaintiffs in whose favor judgment had al-

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[3] That the district court's order purportedly dismissed the "consolidated complaint" rather than the "action" does not by itself raise jurisdictional concerns. As the Ninth Circuit noted, "[i]f it appears that the district court intended the dismissal to dispose of the action, [an order dismissing the complaint] may be considered final and appealable." J.A. 111 (quoting *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1171 n.1 (9th Cir. 1984)); *see also Amazon, Inc.* v. *Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001) (same). As the Ninth Circuit found, "the record clearly indicates that the district court intended to dispose of the consolidated action." J.A. 112.

ready been rendered retained a "sufficient stake" to appeal denial of an earlier motion for class certification because certification would permit them to share more widely the litigation costs they had incurred. *See* 445 U.S. at 334 n.6, 336. In *Forney* v. *Apfel*, the Court permitted a Social Security claimant who had sued for disability benefits or, alternatively, for further administrative proceedings on her claim, to appeal from an order directing the very administrative remand she had requested; the Court unanimously concluded that this alternative relief exposed her to "further delay and risk" by requiring her to engage in further litigation, and that this detriment constituted a "sufficient stake" to appeal. 524 U.S. at 271. In this case, petitioners' "stake" in appealing the order dismissing the Consolidated Complaint easily surpasses the standard reflected in *Roper* and *Forney*.

2. Petitioners were palpably aggrieved by the district court's determination that litigation against them could not proceed in federal court. For one thing, the non-preclusive dismissal denied petitioners the final adjudication they sought, thereby subjecting them to repetitive litigation of the plaintiffs' claims in multiple forums. For another, it deprived petitioners of their statutory right to a federal forum. Either of these deprivations constitutes a sufficient stake for appellate jurisdiction.

a. Because the district court dismissed the Consolidated Complaint without the final adjudication petitioners sought, petitioners will be forced to bear the considerable expense of defending themselves in multiple and potentially overlapping actions in state courts across the country, instead of in a single consolidated proceeding.

The lower courts have held with near unanimity that a federal court's dismissal of state-law claims without prejudice thereafter to litigate those claims in state courts leaves the defendant "aggrieved in a practical sense," *LaBuhn* v. *Bulkmatic Transport Co.*, 865 F.2d 119, 122 (7th Cir. 1988) (Posner, J.), because it does not eliminate the risk of further

litigation. For example, in *Disher* v. *Information Resources, Inc.*, 873 F.2d 136, 138-39 (7th Cir. 1989), Judge Posner held for the Seventh Circuit that a defendant could appeal a dismissal without prejudice of plaintiffs' state-law claims for lack of subject matter jurisdiction because such a dismissal exposes defendant to the "risk . . . of further litigation" in state court and, thus, "is not entirely in the defendant's favor any more than a judgment for $1 million would be entirely in favor of a plaintiff who believed he was entitled to a judgment for $1,236,000." *Id.* at 138. The Tenth Circuit recently reached the same conclusion in *Amazon, Inc.* v. *Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001), when it considered *sua sponte* whether a defendant could appeal a dismissal without prejudice of plaintiffs' state-law claims for lack of subject matter jurisdiction:

> Here, [defendant] sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, [defendant] received only a part of what it sought. This disposition left [defendant] open to precisely what happened in this case, a second litigation. [Defendant] was sufficiently aggrieved by this result, and consequently has standing to appeal.

Id. at 1275-76 (citations omitted). Other courts are in accord. *See, e.g.*, *Cella* v. *Togum Constructeur Ensemleier en Industrie Alimentaire*, 173 F.3d 909, 911-12 (3d Cir. 1999) (defendant may appeal dismissal of complaint for lack of subject matter jurisdiction, since it does not leave defendant "completely free from suit but rather . . . require[s defendant] to defend this suit in state rather than federal court"); *LaBuhn*, 865 F.2d at 122 (dismissal without prejudice for lack of subject matter jurisdiction leaves defendant "aggrieved in a practical sense" because "plaintiff remains free to refile his suit in state court"); *Jarvis* v. *Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1424-26 (10th Cir. 1993) (holding defendant may

appeal dismissal without prejudice for lack of subject matter jurisdiction); *Custer* v. *Sweeney*, 89 F.3d 1156, 1163-64 (4th Cir. 1996) (holding that defendant had standing to appeal dismissal without prejudice of state-law malpractice claim for lack of subject matter jurisdiction because dismissal would force defendant "to incur considerable expense relitigating" claim in state court).[4]

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[4] *See also H.R. Techs., Inc.* v. *Astechnologies, Inc.*, 275 F.3d 1378, 1381-82 (Fed. Cir. 2002) (upholding appellate jurisdiction; "without-prejudice dismissal subjects [defendant] to further litigation and thus is not entirely in its favor, just as a judgment awarding money damages is not entirely in favor of plaintiff who had sought a larger award"); *Texas Cmty. Bank, N.A.* v. *Missouri Dep't of Social Servs.*, 232 F.3d 942, 942-43 (8th Cir. 2000) (defendant may appeal decision to abstain; "Abstention in deference to state proceedings does dispose of the federal case, but without prejudice: there remains the possibility that the bank could refile its federal claim"); *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F.3d 640, 647 n.4 (D.C. Cir. 1998) ("[a] prevailing party may appeal a dismissal without prejudice on the grounds that it wants one with prejudice"(citation omitted)); *Farmer* v. *McDaniel*, 98 F.3d 1548, 1549 (9th Cir. 1996) (upholding appellate jurisdiction; defendant "did not get all that it wanted—dismissal with prejudice of claims asserted for abuse of the writ—but instead faces the prospect of further litigation on these claims in a different forum"); *Kirkland* v. *National Mortgage Network, Inc.*, 884 F.2d 1367, 1369-70 (11th Cir. 1989) ("district court's order granting voluntary dismissal without prejudice . . . is final and appealable by defendant" (citation omitted)).

The only authority suggesting anything to the contrary is *Concerned Citizens of Cohocton Valley, Inc.* v. *New York State Department of Environmental Conservation*, 127 F.3d 201 (2d Cir. 1997), which involved a plaintiff who, while seeking a determination that that federal law *did not preempt* certain state law, asserted federal jurisdiction under the doctrine of "complete preemption," arguing, on the contrary, that federal law *did preempt* the state law. In denying appellate jurisdiction, the Second Circuit merely held that, in such circumstances, a defendant was not "aggrieved" when the district court found no federal jurisdiction over the inherently self-contradictory complaint. *Id.* at 204. The rationale of *Cohocton*, however, does not extend to cases in which, as here, subject matter jurisdiction is premised on the diversity statute. *See* 28 U.S.C. § 1332. The Second Circuit's subsequent decision in *Gutierrez* v. *Fox*, 141 F.3d 425 (2d Cir. 1998) (in which the court adjudicated a defendant's appeal

The practical injury inflicted by the dismissal is serious. Petitioners have already incurred significant costs litigating the claims in the district court. Among other things, the parties have fully litigated motions to dismiss the Consolidated Complaint, and petitioners have submitted lengthy answers to that complaint. J.A. 4-7. In addition, the parties have fully briefed and argued the issue of class certification, and there has been extensive discovery on that issue. J.A. 9-20, 41-42. The district court's dismissal without prejudice means much of that work would have to be repeated—and not in just one consolidated action, but in numerous different actions in numerous different state venues. Those proceedings will inevitably proceed at different paces and impose different and possibly conflicting obligations on the petitioners. The lack of any state-level mechanism comparable to the Judicial Panel on Multi-District Litigation to permit "cross-state" pre-trial consolidation of these cases, *cf.* 28 U.S.C. § 1407, compounds the harm inflicted on petitioners by the district court's dismissal of the Consolidated Complaint. The overall practical injury imposed by the judgment of dismissal could hardly be clearer.

b. Dismissal for lack of subject matter jurisdiction also denies petitioners their statutory right to a federal forum. The central question presented in this appeal is whether the diversity statute provides petitioners a federal forum for litigation of the claims against them. The very purpose of the diversity statute is to provide "non-resident litigants . . . courts free from susceptibility to potential local bias." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 111 (1945); *see Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U.S. 48, 54 (1954)

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of a *sua sponte* dismissal of a federal diversity-based complaint, even following a jury verdict against him), underscores this point. In any event, *Cohocton* predates this Court's ruling in *Forney* and did not consider that a dismissal not on the merits: (1) constituted less relief than the defendant sought; and (2) exposed the defendant to the additional economic burden of litigating in another forum.

(Frankfurter, J., concurring). To avoid being subjected to such potential local bias, the diversity statute affords non-resident plaintiffs the right to bring their state-law claims against local defendants on the neutral ground of federal court, and (in conjunction with the removal statute) affords defendants haled into a foreign state court the concomitant right to have claims *against* them heard in federal court.[5] The district court's dismissal order caused petitioners injury by depriving them of that right, forcing them to face plaintiffs in the courts of plaintiffs' own home states.

This Court has previously recognized that the loss of the right to an adjudication in the forum of one's choice is a cognizable legal injury. In *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 500 U.S. 72, 77 (1991), this Court permitted plaintiffs to appeal removal of their state complaint to federal court even though they lacked standing to litigate any of the substantive claims they raised. Nonetheless, this Court held, "[p]etitioners' injury is clear, for they have lost the right to sue in Louisiana court—the forum of their choice." *Id.*; *see id.* at 78 ("The 'adverseness' necessary to resolving [appeal of] the removal question is supplied . . . by petitioners' desire to prosecute their claims in state court." (footnote omitted)).

Just the same is true here. The judgment of dismissal deprived petitioners of their right under the diversity statute to defend against plaintiffs' claims in the neutral forum of a federal court. That gives them a sufficient—indeed, quite fundamental—stake in these appellate proceedings. *See, e.g.*, *Cella*, 173 F.3d at 911-12 (relying on *International Primate* to conclude that defendant's interest in a federal forum con-

[5] *See Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 356 (1988) (exercise of diversity jurisdiction invoked by defendant "is not discretionary"); *cf. Donald* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U.S. 329, 332 (1916) (invalidating state law interfering with right of non-resident defendant to invoke diversity jurisdiction of federal court); *Harrison* v. *St. Louis & San Fran. R.R.*, 232 U.S. 318, 330-31 (1914) (same).

stituted sufficient stake to appeal dismissal of complaint predicated on diversity jurisdiction). Appellate jurisdiction is therefore proper for this additional reason.[6]

3. The propriety of appellate jurisdiction in this case can readily be seen by considering how matters would appear if this litigation had been precipitated not by respondents demanding specific performance of the Rebate Program, but rather by its functional equivalent—a suit by petitioners seeking a declaratory judgment that they had lawfully terminated the Program. Had the district court dismissed *that* complaint for lack of subject matter jurisdiction, there could be no doubt whatsoever that petitioners would have a sufficient

[6] It would be incorrect to argue that the bar to appealing a *remand* order in the removal context, *see* 28 U.S.C. § 1447(d), reflects a broader congressional understanding that deprivation of the defendant's statutory right to a federal forum—even by a *dismissal* order—does not impose injury sufficient to create a genuine stake in the appeal. If anything, § 1447(d) proves exactly the opposite—the statute plainly presupposes that a determination that a case cannot proceed in federal court imposes a cognizable legal injury on the party that wants the protection of the federal forum. If the general rule were otherwise, the statutory bar to appeal would be entirely unnecessary. Indeed, not even all *remand* orders are non-appealable under § 1447(d)—only those that are based on technical defects in the removal or on lack of subject matter jurisdiction. *See Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 346-52 (1976); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996) (remand orders subject to appellate review under *Thermtron* are appealable final orders under § 1291). *Thermtron* and *Quackenbush* confirm Congress's judgment that an order depriving a party of a federal forum is an appealable order, unless the order not only is a remand order, but one that strictly satisfies the conditions set forth in the removal statute. Here, of course, the order was not a remand at all, but a dismissal of a new federal court complaint. Accordingly, what operates is not § 1447(d)'s specific proscription against appellate review of remand orders, but the general background presumption that deprivation of a defendant's asserted right to a federal forum imposes a harm sufficient to support appellate jurisdiction.

"stake" to support appellate jurisdiction. In every meaningful sense, the case in its present posture is no different.[7]

CONCLUSION

For the foregoing reasons, the court of appeals properly asserted jurisdiction over petitioners' appeal from the dismissal of the Consolidated Complaint for lack of subject matter jurisdiction.

Respectfully submitted,

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SEPTEMBER 2002

[7] *Compare* Resp. Br. 32 n.21 (arguing that the "controversy" in this case would be the same if petitioners had sought a declaratory judgment validating their right to terminate the Rebate Program) *with* Pet. Reply Br. 10 (agreeing on this point). *See also* Brief of the United States as *Amicus Curiae* at 12-13 (same).

APPENDIX

APPENDIX

[Steve W. Berman letterhead]

September 13, 2002

Ms. Denise McNerney
Merits Clerk
United States Supreme Court
Washington, D.C.

Re: Case No. 01-896
Ford Motor Co., *et al.* v. McCauley, John B., *et al.*

Dear Ms. McNerney:

We are writing in response to the Order of September 13, 2002.

The Order asks the parties to address the issue:

> "Is there appellate jurisdiction when petitioners, as the nominally prevailing party in the district court, appeal the district court's dismissal of a complaint for lack of subject matter jurisdiction?"

In the district court, the petitioners did not prevail. They urged the district court to retain jurisdiction, and the district court declined to do so. In essence, the petitioners always sought federal court jurisdiction, and when the court declined jurisdiction, petitioners appealed. Thus, the premise of the question is, with the utmost respect, confusing. We would like to be responsive to the Court's concerns, so we bring this to your attention.

Sincerely,
/s/ Steve W. Berman
Steve W. Berman

SWB:slt

cc: Walter E. Dellinger (via facsimile)

Supreme Court, U.S.
FILED
MAY 6 2002
CLERK

No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. MCCAULEY *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a class-action lawsuit that seeks programmatic injunctive relief on behalf of a putative nationwide class may be heard in federal court, when the parties are completely diverse and the relief sought by the plaintiffs would cost the defendants more than $75,000.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 122 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 575 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as the Appendix.[1]

PLAC's members have a significant interest in the rules that govern class actions. Many of PLAC's members are frequently named as defendants in class-action lawsuits that seek injunctive relief on a nationwide basis, as is the case here. Consequently, PLAC's members have a substantial interest in whether and when federal jurisdiction may extend to such claims.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT

This dispute arises from a decision by Ford Motor Company and Citibank to terminate their nationwide credit card rebate program. The plaintiffs, who purport to sue on behalf of a class of six million consumers throughout the Nation, seek an injunction reinstating the program on a national level. It is undisputed that the cost of reinstatement—for either a single class member or the entire class—would vastly exceed $75,000. The question presented is whether this cost satisfies the amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332(a).

SUMMARY OF ARGUMENT

This case belongs in federal court. Indeed, it is the paradigmatic diversity case because it is thoroughly interstate in nature—the parties are completely diverse and the plaintiffs seek programmatic injunctive relief that runs nationally—and because the amount in controversy is easily of sufficient magnitude. The Ninth Circuit's decision to ignore the "fixed legal costs of compliance" that Ford and Citibank would incur were an injunction to issue is legally baseless. Such a rule clashes with the language and purpose of § 1332(a) and defies logic. It would lead to nonsensical results in class actions where, for example, the plaintiffs request that the defendant fund a nationwide corrective advertising campaign or undertake a massive environmental cleanup.

The Ninth Circuit's ruling, if affirmed, risks permitting a small group of state-court judges, handpicked by the plaintiffs' class-action bar, to dictate national policy on subjects ranging from insurance law to environmental regulation to automobile and pharmaceutical safety standards. Such a result is inconsistent with basic principles of federalism, which prohibit a single state-court judge from issuing rulings that displace the laws and policy judgments of other States and effectively legislate on a national level. This Court has long defended state autonomy by rigorously enforcing the constitutional limits on one State's ability to regulate beyond its

borders. *See, e.g., Healy v. The Beer Institute*, 491 U.S. 324 (1989); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Permitting federal jurisdiction over the type of class-action claim presented here—where a plaintiff class seeks a programmatic nationwide injunction—is a sensible policy result that is in harmony with principles of diversity jurisdiction and federal class-action rules. Plaintiffs' class-action lawyers are increasingly filing duplicative "cut-and-paste" lawsuits in multiple courts simultaneously, hoping to find the one judge who will certify a nationwide class. The federal court system, which can transfer and consolidate such cases if necessary, *see* 28 U.S.C. § 1407, is well suited to handle this small but significant subset of class actions. Federal courts are also better suited than state courts to determine if class, rather than individual, treatment of particular cases is appropriate.

ARGUMENT

Plaintiffs seek an order compelling Ford and Citibank to reinstate their terminated credit card rebate program on a nationwide basis—a remedy that would cost Ford and Citibank well over $75,000. The complete diversity of the parties, the clear interstate nature of the relief requested, and the sheer magnitude of the cost that would be imposed on the two out-of-state defendants, plainly suffice to confer jurisdiction on a federal court.

I. THIS TYPE OF CLASS ACTION IS THE PARADIGMATIC DIVERSITY CASE

The diversity statute, 28 U.S.C. § 1332(a), reflects Congress's intent to provide a federal forum for disputes of sufficient magnitude between citizens of different States. Here, there is no dispute that the parties are completely diverse. Pet. App. 6a. Indeed, a local plaintiff haling into state court two large, out-of-state corporations raises the potential for the very type of "hometown" bias that diversity jurisdiction was intended to prevent. *See Barrow S.S. Co. v. Kane*, 170

U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal] courts . . . jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides.").

The courts below, however, refused to exercise jurisdiction because they concluded that the statute's amount-in-controversy requirement had not been satisfied. That conclusion is incorrect: A class-action lawsuit seeking relief of this magnitude easily surpasses the threshold set by Congress, and is precisely the sort of large case with an out-of-state defendant and nationwide implications that Congress envisioned would be heard in the federal courts.

Article III, Section 2 of the United States Constitution provides that "[t]he judicial Power shall extend to . . . Controversies . . . between Citizens of different States," and Congress has provided for diversity jurisdiction since the Judiciary Act of 1789, 1 Stat. 78. The requisite amount in controversy, originally set at $500, has increased over time to its current level of $75,000. 28 U.S.C. § 1332(a). In adjusting this amount, Congress has recognized that "[t]he jurisdictional amount should not be so high as to convert the Federal Courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 85-1830, at 3-4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099-3101; H.R. Rep. No. 85-1706, at 3 (1958).

The Ninth Circuit held that even if the cost of an injunction running in favor of a single plaintiff exceeded $75,000 (a fact that is undisputed in this case), federal jurisdiction would still not exist because the amount-in-controversy requirement "cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." Pet. App. 12a. Taking such costs into account, the court reasoned, would be "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." *Id.* The court concluded that "[i]f the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, then every case, however trivial, against a large corporation would cross the threshold" of federal jurisdiction. *Id.* (citation omitted).

As an initial matter, the Ninth Circuit's suggestion that this case is nothing more than a "small diversity suit" is plainly incorrect. Indeed, the court itself never disputed the fact that reinstating the rebate program, for even a single plaintiff, would cost Ford and Citibank vastly more than $75,000. Particularly in light of the well-settled rule that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal," *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938), it is manifest error to decline jurisdiction where, as here, it appears "to a legal certainty" that the claim is for far *more* than the jurisdictional amount.

The Ninth Circuit's reasoning threatens to bar from federal court a relatively small but significant group of class-action lawsuits: those in which the *fixed* cost of complying with an injunction exceeds the jurisdictional amount, but the *marginal* cost of providing relief to an individual class member falls under the $75,000 threshold. For example, the Ninth Circuit's rule would likely preclude federal jurisdiction in cases where a class of plaintiffs requests a nationwide corrective advertising campaign or demands that a manufacturer conduct an environmental cleanup. *See, e.g.*, *Tylka v. Gerber Prods. Co.*, 211 F.3d 445 (7th Cir. 2000) (seeking injunction ordering baby food manufacturer to conduct advertising campaign to correct alleged misrepresentations about food's nutritional value); *O'Connor v. Boeing North American, Inc.*, 197 F.R.D. 404 (C.D. Cal. 2000) (seeking injunction requiring defendant to clean up alleged contamination). Even though a defendant could be required to pay millions of dollars to fund the advertising campaign or the cleanup, the Ninth Circuit's rule would force it to litigate the claim in state court on the grounds that such significant costs were simply the "fixed administrative costs of compliance."

An equally absurd outcome would result were a plaintiff class to seek an injunction directing the defendant to make major changes to its business operations. *See, e.g.*, *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 73 (E.D.N.Y. 2000) (seeking injunction barring defendant credit card companies from requiring stores that accept defendants' credit cards to accept defendants' debit cards as well); *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 356 (D. Colo. 1999) (seeking injunction compelling redesign of restaurants); *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 774 (N.D. Ill. 2002) (seeking injunction requiring defendant to "complete [its] Pick Your Price" game allegedly compromised by fraud); *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 5-6 (Cal. Ct. App. 2001) (seeking injunction forcing defendant to halt challenged billing practices). *Cf. Lucero v. Detroit Pub. Schs.*, 160 F. Supp. 2d 767, 767 (E.D. Mich. 2001) (seeking injunction barring opening of new elementary school); *Bacon v. Honda of America Mfg., Inc.*, 205 F.R.D. 466, 468-69 (S.D. Ohio 2001) (seeking injunction compelling employer to conduct sensitivity training). In each instance, the fixed cost to the defendant would be immense, whereas the marginal cost of providing relief to an additional plaintiff would be zero. Yet the Ninth Circuit's approach would ignore the undeniably large amount in controversy in such cases on the basis of its artificial distinction between marginal costs and fixed administrative costs of compliance.

An additional flaw in the Ninth Circuit's rule is that it presumably only applies in the class-action context. If a *single* plaintiff were to sue, seeking to force the defendant to clean up a hazardous waste site, the Ninth Circuit would apply the "either viewpoint" rule under *Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944), and deem the amount-in-controversy requirement satisfied. But if that single plaintiff were suddenly joined by an entire *class*—thus magnifying the case's significance exponentially—the Ninth Circuit would characterize the cleanup expenses as the "fixed

cost of compliance" and divest the federal court of jurisdiction.[2]

California law provides a good example. Under California's "private attorney general" statute, a consumer can file an action seeking injunctive relief on behalf of the citizens of California. *See* CAL. BUS. & PROF. CODE § 17200 *et seq.*; *see also, e.g.*, *Kasky v. Nike, Inc.*, No. S087859, 2002 WL 827173 (Cal. May 2, 2002) (§ 17200 action seeking injunctive relief, including a "Court-approved public information campaign" to correct allegedly false advertising). If the defendant was not a California resident, and if complying with the requested injunction would impose more than $75,000 in fixed costs, diversity jurisdiction would presumably exist. But if the same plaintiff filed the same lawsuit seeking the same relief on behalf of a nationwide class, the Ninth Circuit's rule would *prohibit* federal jurisdiction.

From the defendant's perspective, of course, there is little difference whether a cost is characterized as "fixed" or "marginal." In this case, for example, Ford and Citibank would be forced to resurrect the business apparatus for tracking cardholders' accrual of rebates; they would also have to maintain the computer systems necessary to verify which purchases qualify for rebate accrual; and they would have to pay the salaries of the employees running the program. Pet. 17. Contrary to the Ninth Circuit's suggestion that this is nothing more than a "small diversity suit" properly excluded from federal court, Pet. App. 12a, this case—and others like it—have enormous financial consequences for the defendants. Barring such cases from federal court on the basis of a legally insignificant distinction concerning whether a cost is fixed or marginal directly undercuts the purpose of diversity

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[2] Such a result is inconsistent with the Federal Rules themselves. *See* FED. R. CIV. P. 82 (providing that Federal Rules may not be construed to limit federal jurisdiction); *Snyder v. Harris*, 394 U.S. 332, 341 (1969) ("[T]he Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts.").

jurisdiction, which is to provide a federal forum to out-of-state defendants in cases of reasonable magnitude.

II. THE CONSTITUTIONAL PRINCIPLES THAT BAR STATE COURTS FROM DICTATING NATIONAL POLICY SUPPORT RECOGNITION OF FEDERAL JURISDICTION

Plaintiffs seek nationwide injunctive relief on behalf of a putative nationwide class of cardholders. If this case is barred from federal court, then a single state court will be asked to make a determination that the defendants' conduct was unlawful *on a national basis*, and to order a remedy of programmatic injunctive relief to be implemented nationwide. This threatens basic principles of federalism. Such a directive could result in a single state court establishing public policy on a national level, and quite possibly overriding the laws of the 49 other States in the process. The Commerce Clause and the Due Process Clause prohibit States from seeking to regulate conduct in other jurisdictions, particularly in a way that would interfere with the policy choices of other States. This constitutional mandate applies regardless of whether the State seeks to regulate extraterritorial conduct through legislation or, as here, through judicial fiat. A federal forum is necessary to minimize the risk that a state court will determine national policy by projecting its law into other States.

It is well settled that "[n]o State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). The Commerce Clause thus acts as "a limitation upon the power of the States," *Freeman v. Hewit*, 329 U.S. 249, 252 (1946), and "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy v. The Beer Institute*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)).

This Court has long defended state autonomy by rejecting efforts by one State to interfere with the policy choices of other States. In *Healy*, this Court underscored "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." 491 U.S. at 335-36 (footnotes omitted). The Court then struck down a Connecticut statute that controlled commercial conduct in other States, emphasizing that the Commerce Clause bars "the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 337. Likewise, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 584 (1986), the Court barred New York's effort to "project[ ] its legislation into other States, and directly regulate[ ] commerce therein" (citation omitted). Indeed, the Court emphasized that when a state statute "directly regulates" commerce in other States, the Court has "generally struck down the statute without further inquiry." *Id.* at 579.

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), the Court relied on *Healy* in recognizing that the Due Process Clause imposes similar limits on a State's ability to regulate conduct in other jurisdictions. In enforcing the constitutional limits on Alabama's ability to impose punitive damages based on the defendant's conduct in other States, the Court explained that no State can "impose its own policy choice on neighboring States." *Id.* at 571. Indeed, "one State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, . . . but is also constrained by the need to respect the interests of other States." *Id.* The Court concluded that a State "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," because such punishment would impermissibly and unconstitutionally interfere with the policy choices of those States by supplanting their own laws and regulations.

That, of course, is the precise danger posed by this case. The Constitution prohibits a state court from regulating on a

national scale, thereby running roughshod over the laws of the other States and imposing its policy choice on the entire Nation. Yet that is the likely result were a state court to issue a nationwide programmatic injunction in this case.

The danger is not speculative. In *Avery v. State Farm Mutual Automobile Insurance Co.*, 746 N.E.2d 1242, 1247 (Ill. App. Ct. 2001), a nationwide class of plaintiffs alleged that State Farm breached its contracts with its insureds by refusing to pay for original equipment manufacturer (OEM) parts, and using less expensive, non-OEM parts instead. An Illinois county court certified a nationwide class and the jury imposed a $1.18 billion award. *Id.* A court of appeals upheld the award, rejecting evidence from "[f]ormer and current representatives of state insurance commissioners [who] testified that the laws in many of our sister states permit and in some cases encourage the use of non-OEM parts as an effort to encourage competitive price control." *Id.* at 1254. The court reasoned that the laws of the other States were irrelevant because the county court had deemed the replacement parts "inferior." *Id.*

The *Avery* case triggered a media firestorm because the Illinois court had essentially overruled the laws of other States, many of which had reached a carefully considered policy judgment that insurers should be allowed—and in some cases *encouraged*—to use cheaper non-OEM parts in making repairs to motor vehicles as a means of controlling the cost, and broadening the availability, of insurance coverage. According to a contemporaneous report in *The New York Times*, the result of the Illinois decision was to "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," and "to make what amounts to a national rule on insurance." *See* Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. TIMES, Sept. 27, 1998, at A29.

Plaintiffs' lawyers are asking state courts to make national policy in another group of cases, the so-called "no-injury" class actions against carmakers in which a plaintiff

class seeks to recover on the basis of a purported defect that allegedly has the *potential* to cause injury. *See, e.g., Dalton v. Ford Motor Co.*, No. Civ.A 00C-09-155WCC, 2002 WL 338081 (Del. Super. Ct. Feb. 28, 2002). These lawsuits amount to nothing more than an invitation for state courts to override the judgments of the other States, as well as the regulations of the National Highway Traffic Safety Administration, and legislate motor vehicle safety and design standards on a national level.

The question presented by this and similar lawsuits is whether a state judge should be empowered to issue rulings that determine how companies may market and sell their products and services throughout the Nation. As the Senate Judiciary Committee has noted, "a system that allows State court judges to dictate national policy from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism." S. Rep. No. 106-420, at 20 (2000). To be sure, a *federal* court has no license to use the class-action mechanism to override the laws of the States, *see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) ("The diversity jurisdiction of the federal courts is, after *Erie*, designed merely to provide an alternative forum for the litigation of state-law claims, not an alternative system of substantive law for diversity cases."). But diversity jurisdiction was established to counter the dangers of local bias influencing the resolution of interstate disputes.

Consequently, to the extent that *any* judge may undertake to issue a nationwide injunction in a dispute between diverse parties, our system contemplates that it be a *federal* judge, who is nominated by the President and confirmed by the elected Senators from each State. Indeed, inherent in the Constitution's grant of diversity jurisdiction is the concept that federal judges will interpret and apply the laws of various States. And a nationwide class action—which could require a court sitting in Arizona to resolve the claims of a South Dakota resident against a Massachusetts-based company—is the quintessential example of a case that demands an often complex application of the laws of multiple States.

The availability of a federal forum also ensures that plaintiffs who seek a nationwide remedy do so pursuant to the federal procedural rules governing class actions and injunctions. *See* FED. R. CIV. P. 23, 65. Otherwise, a plaintiffs' lawyer could seek to certify a nationwide class in a State with comparably relaxed standards governing certification (or injunctions), and then leverage a ruling under those relaxed standards to control conduct throughout the Nation.

Moreover, federal courts are best suited to decide when federalism concerns make individual treatment of claims a preferable alternative to class treatment, and one that is more respectful of state autonomy. For example, in *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, Nos. 02-1437, 02-1438 & 02-1439, 2002 WL 831990, at *3 (7th Cir. May 2, 2002), the court decertified two nationwide classes, emphasizing that "[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules" (citing *BMW*, 517 U.S. at 568-73). The court added that "[d]ifferences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." 2002 WL 831990, at *6.

In sum, it defeats the purpose of diversity jurisdiction to construe the diversity statute in a way that permits federal judges to hear slip-and-fall cases based on the mere theoretical *possibility* that the plaintiff could recover more than $75,000, while barring them from resolving disputes over how multibillion-dollar industries can conduct their business nationwide, even when the requested injunctive relief will, *to a legal certainty*, cost the defendant far more than the jurisdictional amount. Given the potential for national policy-making inherent in class action litigation where a nationwide injunction is requested, fundamental principles of federalism compel the conclusion that such cases be heard in federal court.

III. FEDERAL JURISDICTION IN CLASS ACTIONS THAT SEEK NATIONWIDE INJUNCTIONS IS SENSIBLE POLICY

It is sensible policy, and harmonizes with the purposes of diversity jurisdiction and the federal procedural rules governing class actions, to allow federal courts to hear class-action cases where the plaintiffs seek substantial nationwide injunctive relief. Such cases, small in number but large in significance, are best resolved by a federal court.

"Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest." *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.). Indeed, "[e]xperience teaches that it is counsel for the class representative, and not the named parties, who direct and manage these actions." *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1309 n.7 (3d Cir. 1993) (citation omitted).

One common tactic favored by the plaintiffs' class-action bar is the filing of the same lawsuit in different jurisdictions in the hope that one court will agree to certify a nationwide class. This tactic results in severe inefficiencies and potentially conflicting rulings. As explained in a recent memorandum to the federal Judicial Conference's Advisory Committee on Civil Rules:

> [S]trategic maneuvering by plaintiffs' attorneys often results in a proliferation of duplicative class action litigation in different jurisdictions. "As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward." Moreover, "[t]he availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties who are unhappy with the outcome

in one jurisdiction move on to seek more favorable outcomes in another."

Memorandum to Advisory Comm. on Civil Rules from Judge Lee Rosenthal, Prof. Edward H. Cooper, and Prof. Richard Marcus (April 10, 2001), quoting Deborah R. Hensler *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 15 (1999).

Especially in the context of class actions seeking the certification of a nationwide class—which often qualify as "universal venue" cases that can be filed anywhere in the country—there is a strong incentive to file multiple concurrent lawsuits in a host of different state courts. All it takes is finding a local resident.[3] Indeed, a Senate Judiciary Committee Report found that "another common abuse [of the class action device in state courts] is the filing of 'copy cat' class actions (*i.e.*, duplicative class actions asserting similar claims on behalf of the same people)." *See* S. Rep. No. 106-420, at 19 (2000).[4]

Federal courts, which have the ability to transfer and consolidate duplicative class actions before a single court,

[3] One plaintiffs' firm now offers a website that purports to "alert" potential clients to class-action litigation and invites members of the public to submit ideas for future class-action lawsuits. *See* www.ClassActionAmerica.com (promising that "Justice is now a click away!"). *See also* Don Oldenburg, *The Web's Class-Action Clearinghouse*, WASH. POST, April 24, 2002, at C14 (noting that website "[u]sers can also submit information online to an attorney for a free evaluation or to determine whether award money is due").

[4] The report goes on to note that "sometimes these duplicative actions are filed by lawyers who hope to wrest the potentially lucrative lead role away from the original lawyers, [and] in other instances, the 'copy cat' class actions are blatant forum shopping—the original class action lawyers file similar class actions before different courts in an effort to find a receptive judge who will rapidly certify a class." *Id.* A recent study confirms these findings. *See* John H. Beisner and Jessica Davidson Miller, *They're Making a Federal Case Out Of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143 (2001) (identifying problems with state-court class actions).

see 28 U.S.C. § 1407 (providing for transfer and consolidation by the Judicial Panel on Multidistrict Litigation), can prevent this type of wasteful strategic maneuvering and foster uniformity in the law. Where class treatment is appropriate, defendants will not be forced to litigate the same nationwide claim in multiple States simultaneously, nor will a host of different state courts be forced to waste their resources unnecessarily examining and resolving identical issues.

In addition to conserving judicial resources, recognizing federal jurisdiction also prevents forum shopping. Plaintiffs' lawyers know that all they need is for a single judge to agree with their theory and the nationwide class is launched (and the settlement value of the case is increased exponentially). It is hardly surprising that certain state courts attract a stunningly disproportionate share of class-action filings, and have become magnets for class-action litigation. *See* H.R. Rep. No. 107-370, at 18 (2002) (noting that one Alabama state judge certified at least 35 cases for class treatment during 1996-1998, almost as many as were certified by all 900 federal trial court judges combined during calendar year 1997); Hensler, *Class Action Dilemmas*, Executive Summary at 7 (finding that "[c]onsumer class actions were more prevalent in Alabama than one would expect on the basis of population, and Louisiana led in the number and rate of mass tort class actions"); Marsha J. Rabiteau, *Abusive Class Actions: An Expanding Growth Industry*, National Legal Center for the Public Interest (2001), at 4 ("Plaintiffs' counsel locate magnet state courts not because they have a reputation of fairness to class members and defendants, but because certification of a class, no matter the merits, inevitably leads to settlement and enormous fees to class counsel.").[5]

The inevitable result of such careful forum shopping is that a small group of state court judges, handpicked by the

[5] *See also* Beisner and Miller, 25 HARV. J.L. & PUB. POL'Y at 160 (finding that three county courts in Illinois, Texas and Florida "have experienced a disproportionately high volume of class action filings, given their populations and general case docket size").

plaintiffs' class-action bar, ends up setting policy for businesses and consumers throughout the Nation. In fact, the subset of judges who regulate in this way is narrowed even further in that it is only those judges willing to certify the purported nationwide classes proffered by plaintiffs' lawyers who find themselves in a position to make national law. Recognizing federal jurisdiction in this type of large-scale, nationwide class action will thwart such attempts to forum shop and help preserve the integrity of each State's laws and policy choices.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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May 6, 2002

APPENDIX

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

BIC Corporation

Biro Manufacturing Company Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

C.R. Bard, Inc.

Caterpillar Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

E & J Gallo Winery

E.I. DuPont de Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Lincoln Electric Holdings, Inc.

Mazda (North America), Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R & D of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc.

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Raytheon Aircraft Company

Rheem Manufacturing

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.

(4)

Supreme Court, U.S.
FILED
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No. 01-896

In the Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. MCCAULEY, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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In re Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217 (W.D. Mich. 1998) 8

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In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) 8

Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) 6

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MISCELLANEOUS

Class Action Litigation-A Federalist Society Survey, 1 CLASS ACTION WATCH (available at http://www.fed.-soc.org/ Publications/ classactionwatch/volume1issue1.htm) 10

THE FEDERALIST NO. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 6, 7

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

Many of amicus's members have been subjected to abusive, extortionate class actions in state courts. They accordingly have a strong interest in exposing the fallacy in the Ninth Circuit's interpretation of the amount-in-controversy requirement that paradoxically makes it more difficult to remove class actions to federal court than individual law suits.[1]

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief. Attorneys in the Chicago office of Mayer, Brown, Rowe & Maw (then Mayer, Brown & Platt) briefly served as local counsel for petitioner Citibank (South Dakota), N.A. ("Citibank") in one of the six state-court class actions that were removed to federal court and then transferred to the Western District of Washington pursuant to 28 U.S.C. § 1407. After that transfer, in January 1998, Mayer, Brown, Rowe & Maw's role as counsel for Citibank in this litigation came to an end.

The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

The Ninth Circuit accepted the proposition that, in individual cases seeking injunctive relief, the amount-in-controversy requirement for diversity jurisdiction is satisfied if either the value of the injunction to the plaintiff or the defendant's cost of complying with the injunction exceeds $75,000. Pet. App. 7a. It held, however, that, in *class actions* seeking injunctive relief, there is an "inherent conflict" between this "either viewpoint" principle and this Court's cases holding that the value of the claims of multiple plaintiffs may not be aggregated to satisfy the amount-in-controversy requirement. *Id.* at 8a-9a. Holding that the former principle "must yield" (*id.* at 9a), the Ninth Circuit fashioned a new rule for class actions seeking injunctive relief: in class actions — but not individual suits where there is no "inherent conflict" — "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000" (*id.* at 12a).

The Ninth Circuit's new rule is logically flawed for two independent reasons. First, when, as here, the defendant's compliance costs would suffice to create diversity jurisdiction had a single plaintiff brought the action, the non-aggregation principle is inapplicable and there therefore is no "inherent conflict" requiring creation of a special rule. Second, the Ninth Circuit's ruling frustrates the rationale for diversity jurisdiction in the first place. The recent uptick in abusive class-action lawsuits has demonstrated that, if anything, out-of-state defendants need *more* protection from the parochial prejudices of juries and state court judges beholden to local interests in the class-action context; they certainly should not be afforded *less* protection.

ARGUMENT

28 U.S.C. § 1332 provides that, *inter alia,* when the parties are citizens of different states, the federal courts have jurisdiction over the case if "the matter in controversy" exceeds

$75,000. The Ninth Circuit recognized that, in determining the value of "the matter in controversy," it is necessary to consider "the pecuniary result to either party which the judgment would directly produce." Pet. App. 7a. "In other words," the court explained, "where the value of a plaintiff's potential recovery * * * is below the jurisdictional amount, but the potential cost to the defendant of complying with [a requested] injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes." *Ibid.*

That should have been the end of the matter because it is beyond dispute that the cost to petitioners of affording the injunctive relief sought by respondents would far exceed $75,000. The court went on to hold, however, that, although "logic would dictate that [the either viewpoint rule] should apply to all multi-party complaints" (*id.* at 8a), doing so would create an "inherent conflict" with this Court's holdings that the claims of multiple plaintiffs may not be aggregated in determining whether the amount-in-controversy requirement is satisfied (*id.* at 8a-9a). The Ninth Circuit acknowledged that petitioners' argument did not involve aggregation: the fixed costs of injunctive relief would greatly exceed $75,000 whether there were "one plaintiff or * * * six million." *Id.* at 12a. It nevertheless felt that fealty to "the principle underlying the jurisdictional amount requirement" — "to keep *small* diversity suits out of federal court" — required it to hold that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Ibid.* (emphasis added).

Beyond observing that the plain language of Section 1332 permits no other conclusion, we will leave to petitioners the task of explaining why the "either viewpoint" rule is correct. Nor do we here challenge this Court's adoption of the non-aggregation principle in *Snyder v. Harris,* 394 U.S. 332 (1969),

and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).[2] As the Ninth Circuit recognized, the fixed costs of providing the injunctive relief demanded by respondents would exceed $75,000 even if this were an individual suit. We instead will endeavor to demonstrate why the Ninth Circuit has turned logic on its head by adopting a special rule for multi-plaintiff cases that the administrative costs of complying with an injunction may not be considered in determining the amount in controversy.

The Ninth Circuit's holding is illogical in two distinct ways. First, the premise underlying the Ninth Circuit's adoption of a special rule for class actions — that this case implicates an "inherent conflict" between the either viewpoint rule and the non-aggregation rule — is a false one. Second, the policy concerns that motivated the creation of diversity jurisdiction apply with greater, not lesser, force in the context of multi-party actions. As recent experience reflects, the risk that fundamental fairness to out-of-state defendants will be sacrificed is at its zenith when massive class actions are filed in state courts. It thus makes no sense to create a special rule that would make it harder to remove a class action than it would be to remove an individual case seeking precisely the same relief.

1. The Ninth Circuit recognized that, if this were an individual case seeking reinstatement of petitioners' rebate program, the "either viewpoint" rule would apply, and, because the cost of complying with an injunction would exceed $75,000, the amount-in-controversy requirement would be satisfied. Indeed, unless the "either viewpoint" rule were rejected entirely, no other conclusion is possible.

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[2] Having said that, we do think that the non-aggregation rule has no basis in either the language of Section 1332 or the policy underlying the amount-in-controversy requirement and that, when a case properly presents the issue, the Court should overrule *Snyder* and *Zahn*.

The court concluded, however, that in class actions seeking injunctive relief there is an "inherent conflict" between the either viewpoint rule and the non-aggregation rule, which necessitates "that the former must yield." Pet. App. 8a-9a. Accordingly, it held, in such cases "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.* at 12a. This is a logical fallacy. When, as here, the cost of complying with an injunction would exceed $75,000, whether there is "one plaintiff or * * * six million" (*ibid.*), the non-aggregation principle is inapplicable. Accordingly, there is no "inherent conflict" that warrants abandoning the "either viewpoint" rule and ignoring the administrative costs of compliance.

Nor is the Ninth Circuit's fallacious reasoning excused by its *ipse dixit* that consideration of the administrative costs of compliance "is fundamentally violative of the principle underlying the jurisdictional amount—to keep small diversity suits out of federal court" (*ibid.*). If the "either viewpoint" rule is valid — and we submit that it is for all of the reasons articulated in petitioners' brief — a suit seeking an injunction that would cost millions of dollars to comply with is not a "small diversity suit[]."

2. Putting aside the direct fallacy in the Ninth Circuit's reasoning, making it harder to remove class actions than individual cases requesting the same relief cannot be squared with the reason Congress created — and has never withdrawn — diversity jurisdiction.[3] It is well established that

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[3] It also merits mention that erecting a stricter rule for class actions than individual cases finds no support in *Snyder* and *Zahn*. To the contrary, the essential point of *Snyder* is that the question whether a lawsuit is a class action should not alter the determination of whether that litigation meets the standards for diversity jurisdiction. *Snyder* held that the aggregation of individual claims would violate Federal Rule of Civil Procedure 82, which reinforces that the Federal Rules "'shall not be construed to extend or limit the jurisdiction of the

the purpose of diversity jurisdiction is to protect out-of-state defendants from the parochial interests of juries and state court judges beholden to local interests. As Justice Frankfurter once elaborated:

> The power of Congress to confer [diversity] jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias.* * * [T]here was fear [among the Framers and ratifiers] that parochial prejudice by the citizens of one State toward those of another * * * would lead to unjust treatment of citizens of other States * * *.

Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring).[4]

United States district courts.'" 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). But just as the Rules cannot be construed to "extend" diversity jurisdiction to a lawsuit where no individual plaintiff could sue in federal court, so too can they not be construed to "limit" that jurisdiction to preclude federal diversity jurisdiction over a case merely because it was brought as a class action. That is exactly what the Ninth Circuit did here.

[4] See also, *e.g.*, *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 111-112 (1945) ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias."); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) ("The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different States of the Union, * * * was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal[s] might not be impartial between their own citizens and foreigners."); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.); THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

While diversity jurisdiction has always been a significant protection for out-of-state parties against being treated unfairly by local courts, the need for that protection has multiplied with the advent of modern class-action litigation. Thus, Judge Easterbrook recently explained:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). The Fifth Circuit has similarly noted:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted).

The federal courts have recognized that, in order to prevent the class action device from being used as a weapon of extortion, it is necessary to apply the requirements of Federal Rule of Civil Procedure 23 rigorously.[5] In particular, they have refused to paper over differences in the laws of the various states simply to make a case manageable as a multi-state class

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[5] See, *e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *Castano*, 84 F.3d at 740.

action.[6] The federal appellate courts have also uniformly refused to permit class actions when the claims of the class members would require individualized proof and the defendant would have individualized defenses to those claims.[7] Indeed, several federal courts have recognized that it would violate the defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized.[8]

Regrettably, the state courts, as a group, have been far more lax in enforcing statutory and constitutional limitations on class actions.[9] As one Member of Congress recently testified at a

[6] See, *e.g.*, *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024, 1025 (11th Cir. 1996); *Castano*, 84 F.3d at 749-750; *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 223 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457-462 (D.N.J. 1998).

[7] See, *e.g.*, *Broussard*, 155 F.3d at 340-344; *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397-399 (6th Cir. 1998) (en banc); *Andrews*, 95 F.3d at 1023-1025; *Castano*, 84 F.3d at 744-745; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626-630 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854-856 (9th Cir. 1982); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-883 (5th Cir. 1973).

[8] See, *e.g.*, *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 487-489 & n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997).

[9] We are not suggesting that every state court (or even the majority) has acquiesced in class action abuse, but simply that such abuse occurs with sufficient regularity in the state court system as to make it both counterintuitive and contrary to the core rationale of diversity jurisdiction to endorse a construction of Section 1332 that makes it harder to remove class actions than individual cases that seek the same relief.

House hearing:

> Opportunistic lawyers have identified those states and particular judges where the class action device can be exploited. The most significant of these devices is the certification of the class itself. For many companies, it is easier and less costly to settle a class action suit once it has been certified than to fight it in a foreign jurisdiction before a potentially unfriendly judge and jury. Some state courts, however, do not give the defendants a fighting chance. They routinely certify classes before the defendant has been served with a complaint and given an opportunity to defend itself. In one case, a state court judge certified the class before the case was even filed in the court.

Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. (Mar. 5, 1998) (statement of Rep. James P. Moran) (available at http://www.house.gov/judiciary/41155.htm) (hereinafter "Moran Testimony").

The more sophisticated members of the plaintiffs' class action bar have managed to identify specific counties within particular states in which they can be virtually assured of finding a judge who will certify a case as a class action without regard to whether it can fairly be tried as one. As the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns * * *.
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges,

many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice P.F.D: Big Suits Land in Rural Courts*, WALL ST. J., Oct. 10, 1996, at B1.

A few states have become particularly notorious for allowing extortionate class actions and running roughshod over the constitutional rights of out-of-state defendants and absent class members alike. For example, one study found that in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks at *Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (Mar. 5, 1998)) (available at 1998 WL 122544).[10] Another study found that the number of class actions filed in Texas state courts rose by 820% between 1988 and 1998. See *Class Action Litigation–A Federalist Society Survey*, 1 CLASS ACTION WATCH (available at http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm). That rate of increase is significantly higher than in the federal courts, where the number of pending class actions increased during the same ten-year period by 338%. *Ibid.*

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to dispense casually with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. Whenever the courts of one state begin to enforce the

[10] Dr. Hendricks is the founder of an Alabama research and development company who appeared on behalf of the Chamber.

state-law and constitutional limits on class certification,[11] class action plaintiffs and their attorneys have merely moved their "litigation road show" to more hospitable forums — such as Mississippi,[12] Washington,[13] and southern Illinois, where an October 1999 judgment of more than a billion dollars[14] has

[11] The Alabama Supreme Court has recently begun to rein in runaway state trial courts that were certifying classes without adequate analysis, see, *e.g.*, *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 10-11 (Ala. 1998) (ordering decertification of nationwide class because laws of different states would apply to different class members' claims and because the claims would present individual issues requiring subjective proof), and Texas, which was similarly known as a hotbed of class action activity, has also of late tightened its requirements for class certification through its highest court. See, *e.g.*, *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000) (ordering decertification of class that was not clearly ascertainable).

[12] See Jerry Mitchell, *Out-of-State Cases In-State Headaches*, CLARION-LEDGER, June 17, 2001 (noting that "[n]ews of Mississippi's multimillion-dollar verdicts has attracted trial lawyers from other states, particularly Texas and Alabama").

[13] See, *e.g.*, *Sitton v. State Farm Mut. Auto. Ins. Co.*, No. 00-2-10013-2 (Wash. Super. Ct. 2000) (certifying a class action for injunctive relief and damages on behalf of State Farm insureds alleging improper denials of first-party medical benefits provided by their automobile policies, even though numerous other courts had refused to certify class actions involving the same defendant, many of the same putative class members, and virtually identical legal claims); *Busani v. United Servs. Auto. Ass'n*, No. 99-2-68217-1 (Wash. Super. Ct. 2001) (certifying a 27-state class action seeking "inherent diminished value" ("IDV") damages under the putative class members' automobile insurance policies, even though in many jurisdictions it remains a question of first impression whether IDV claims are legally cognizable even in individual actions, and courts in several other states have already held that they are not).

[14] See *Avery v. State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001) (affirming all but $130,000,000 of $1,186,636,180

served as a magnet attracting class-action lawyers.

Southern Illinois in particular has become the focal point of a flurry of class-action activity. In fact, the biggest growth industry in Madison County, Illinois now seems to be the litigation of class actions; that one jurisdiction has experienced a "steep rise in class action filings over the last several years" and is now "ranked third nationwide (after [the significantly larger] Los Angeles County, California and Cook County, Illinois) in the estimated number of class actions filed each year."[15]

In short, out-of-state class action defendants have been subjected to procedural unfairness in state courts that would not be tolerated by the federal courts. That trend has been accelerating in recent years. As Congressman Moran put it, "[i]n essence, we have a situation where out of state defendants are being haled into the plaintiffs' state court where they face complex litigation with large sums of money at stake. These are the types of cases for which diversity jurisdiction was created." Moran Testimony, *supra*.

In view of the serious threat to fundamental fairness posed by state-court class actions — and the severe extortionate potential of claims for injunctive relief that would cost millions of dollars to effectuate — it makes no sense to interpret Section 1332 to make it more difficult to remove class actions than

individual cases. The only approach that is consistent with both the language and the purpose of the diversity statute is to apply

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judgment) (petition for leave to appeal pending).

[15] See Manhattan Institute, *Civil Justice Report: They're Making a Federal Case out of it . . . in State Court* at 7 (Sept. 2001) (available at http://www.manhattan-institute.org/cjr_03.pdf); see also Noam Nesner & Brian Brueggemann, *The Judges of Madison County: Lawyers Looking for Fat Payouts in Class Action Cases Know Where to Head*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39.

the either viewpoint rule across-the-board. The Ninth Circuit's refusal to do so necessitates reversal.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
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v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE*, SUPPORTING REVERSAL

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE* [1] SUPPORTING REVERSAL

The Business Roundtable submits this brief as *amicus curiae* to address the question accepted by the Court: Whether the restructuring costs that would be incurred by a business to comply with an injunction requested in a class action may satisfy the amount-in-controversy requirement of the diversity jurisdiction statute, where such compliance would cost more than $75,000 regardless of whether compliance related to the entire class or any single member of the class?

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Business Roundtable is an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States and $3.5 trillion in revenues.[2] For thirty years, The Business Roundtable has been devoted to examining policy issues affecting the U.S. economy and developing positions which reflect sound economic and social principles.

The instant case is of substantial importance to The Business Roundtable and, we believe, the U.S. economy, because it addresses the ability of national businesses to adjudicate class actions in a federal forum and to avoid duplicative and inefficient litigation in matters involving substantial sums. It also addresses the even more fundamental issue of the impact on this country's businesses of judicial forum shopping for a state court or a judge with a proclivity to award huge damages to plaintiffs, often far out of proportion to actual damages. The resolution of this case will determine whether the substantial fixed costs imposed on American businesses to comply with injunctive relief will be disregarded by the federal courts in their calculation of the "amount-in-controversy" requirement of the diversity jurisdiction statute, 28 U.S.C § 1332(a).

SUMMARY OF ARGUMENT

The correct analysis of whether a "matter in controversy exceeds the sum or value of $75,000," 28 U.S.C § 1332(a), should use the "either viewpoint" rule (*i.e.*, from the viewpoint of either plaintiff or defendant) in class actions that seek injunctive relief, recognizing the reality that a controversy is not trivial if the injunctive relief requested

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[2] The chief executive officer of Citigroup Inc. is a member of The Business Roundtable. Citigroup Inc. indirectly owns petitioner Citibank (South Dakota), N.A.

would impose substantial costs on defendant. Those costs can satisfy the jurisdictional minimum in class actions, at least when they are structural fixed costs that a defendant would have to endure at the behest of even one successful plaintiff. Although the Ninth Circuit purported to adhere to the "either viewpoint" rule, its decision eviscerates that rule in class actions seeking injunctive relief.

ARGUMENT

I. THE "EITHER VIEWPOINT" RULE IS CONSISTENT WITH BOTH THE LANGUAGE AND PURPOSE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT.

When a plaintiff seeks injunctive relief, "the amount in controversy is measured by the value of the object of the litigation." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). A number of courts, including at least four circuits, recognize the economic impact of injunctions on defendants and use the "either viewpoint" rule to calculate whether "the object of the litigation" meets the jurisdictional threshold of the diversity statute. *See Justice* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503, 505 (10th Cir. 1991); *Smith* v. *Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978); *Berman* v. *Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969); *Government Employees Ins. Co.* v. *Lally*, 327 F.2d 568, 569 (4th Cir. 1964). Under this rule, the courts value a claim by looking at the pecuniary result that the judgment would directly produce on either party. *Ronzio* v. *Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940).

Some circuits, however, adhere to the "plaintiff's only viewpoint" rule, and only look at the claim's value to the plaintiff in calculating the "amount-in-controversy," thereby ignoring the cost of injunctive relief to the defendants. *See Ericsson GE Mobile Communications, Inc.* v. *Motorola*

Communications & Elecs., Inc., 120 F.3d 216, 219 (11th Cir. 1997); *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994); *Kheel* v. *Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972); *Massachusetts State Pharm., Ass'n* v. *Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970); *Alfonso* v. *Hillsborough County Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962).[3]

Notwithstanding this split, the "either viewpoint" rule alone is consistent with the intent of Congress. The jurisdictional amount requirement was imposed by Congress "on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all *substantial* controversies where other elements of Federal jurisdiction are present," but not burden the federal courts with "petty controversies." *See Zahn* v. *International Paper Co.*, 414 U.S. 291, 293 n.1 (1973) (internal citations omitted) (emphasis added). The "plaintiff's-only viewpoint" rule clearly frustrates this intent by "keeping out cases where great sums of money are involved on the part of the defendant, but not the plaintiff." *Hoffman* v. *Vulcan Materials Co.*, 19 F. Supp. 2d 475, 480 (M.D.N.C. 1998).

Furthermore, utilizing the "either viewpoint" rule in injunction cases is supported by the express language of the diversity statute, which provides, in pertinent part, "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or

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[3] It is noteworthy that the most recent of these decisions suggests that the court believed it was "bound" to apply the "plaintiff's only viewpoint" rule and intimated that the "either viewpoint" approach is a better rule. *See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 220 (11th Cir. 1997) ("recogniz[ing] that there are persuasive arguments to support the adoption of the either-viewpoint rule," but noting that "as a panel of this court, we remain bound to follow the plaintiff-viewpoint rule regardless of the wisdom we may attach to it").

value of $75,000, exclusive of interests and costs." 28 U.S.C. § 1332(a). The statute does not at all indicate that only one party's perspective should be considered in calculating this amount. If injunctive relief sought by plaintiffs would impose huge costs on the defendant, that request presents a substantial matter in controversy.

As a leading commentator noted, "[t]he jurisdictional-amount requirement reflects a congressional judgment that federal judicial resources should be devoted only to those diversity cases in which the financial stakes rise to a predetermined level. It is [therefore] difficult to understand why those financial stakes are not implicated when *either* party stands to gain or lose the statutorily determined amount or its equivalent." 15 James W. Moore, *Moore's Federal Practice*, § 102.109[4] (1997); *see also* 14A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3703 (1985) ("[The either viewpoint approach] seems to be the desirable rule, since the purpose of a jurisdictional amount requirement—to keep trivial cases away from the court—is satisfied when the case is worth a large sum to either party.").

Because the "jurisdictional amount prerequisite was enacted primarily to measure substantiality of the suit, the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose," but rather by examining the judgment's pecuniary effect on either party. *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389, 395 (7th Cir. 1979) (internal quotation omitted).

II. THE "PLAINTIFF'S ONLY VIEWPOINT" RULE UNFAIRLY AND ARBITRARILY DENIES DEFENDANTS FACING SUBSTANTIAL COSTS THE PROTECTIONS OF DIVERSITY JURISDICTION.

Diversity jurisdiction was enacted to protect out-of-state litigants against local biases. *Guaranty Trust Co. of N.Y.* v. *York*, 326 U.S. 99, 111-12 (1945). It continues to serve this important purpose. 15 James W. Moore, *Moore's Federal Practice*, § 102.109[4] (1997). As a federal judge noted, "[a]nyone who believes that there is no local chauvinism in the state courts [today] is hiding his head somewhere." Charles Brieant, *Diversity Jurisdiction: Why Does the Bar Talk One Way But Vote Another Way With Its Feet?*, N.Y. St. B. J. 20, 21 (1989).

By only looking at claims from the perspective of a plaintiff, the "plaintiff's only viewpoint" rule arbitrarily and unfairly denies the protection of diversity jurisdiction to defendants who face claims of substantial significance to them.

In contrast, the "either viewpoint" rule (which examines the pecuniary result of an injunction to both the plaintiff and the defendant) fairly ensures the protection of diversity jurisdiction to all litigants facing such claims. *See McCarty*, 595 F.2d at 395 ("[T]he interests of equity and fairness . . . would . . . be well served by allowing the plaintiff's claim to be evaluated for jurisdictional purposes by applying the either viewpoint rule.").

By denying the protections of diversity jurisdiction to corporations which are defending themselves against substantial lawsuits, the "plaintiff's only viewpoint" rule impedes the future development of interstate commerce. Indeed, numerous commentators have acknowledged the important role diversity jurisdiction plays in the development

of the national economy. James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv. L. Rev. 1426, 1449 (1964) ("[Diversity] jurisdiction has been credited with exercising a great influence in fostering interstate commerce and investment, sustaining the public credit and sanctity of contracts, and welding the states into a single nation."); *see also* Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 Brook. L. Rev. 197, 209-10 (1982) (stating that the elimination of diversity jurisdiction would "chill entrepreneurial investment interstate").

III. THE "EITHER VIEWPOINT" RULE SHOULD NOT BE LIMITED TO CERTAIN TYPES OF ACTIONS.

Certain courts, including the Ninth Circuit, purportedly have adopted the "either viewpoint" rule, but then created significant exceptions by using the "plaintiff's only viewpoint" rule for cases involving multiple plaintiffs, actions involving injunctive relief or class actions where there is not a "common and undivided interest" among the plaintiffs. Because the "plaintiff's only viewpoint" rule is inconsistent with the intent of Congress and the purposes of the federal diversity jurisdiction statute, it should not be followed whether it applies to all cases or some subset of cases.

A. The "Either Viewpoint" Rule Does Not Violate the Principle of Non-Aggregation in Class Action Injunction Cases Because It Evaluates Each Claim for Injunctive Relief Separately.

It is well-settled that the diversity statute's amount-in-controversy requirement cannot be met by aggregating the claims of individual plaintiffs in a class action seeking only damages. *Zahn*, 414 U.S. at 300; *Snyder* v. *Harris*, 394 U.S.

332, 336 (1969). Certain courts have concluded that this principle limits the "either viewpoint" rule to actions that are not class actions or to actions that are not class actions for injunctive relief. *See, e.g., Gilman* v. *Wheat, First Sec., Inc.*, 896 F. Supp. 507, 509 (D. Md. 1995) (holding that the non-aggregation rule "prohibit[s] establishing the amount in controversy solely from the defendant's perspective" because it would permit plaintiffs to avoid the rule by simply requesting injunctive relief (internal citation omitted)); *Bassett* v. *Toyota Motor Credit Corp.*, 818 F. Supp. 1462, 1467 (S.D. Ala. 1993) (finding that the "either viewpoint" rule should not be used in class action lawsuits where there are separate and distinct claims).

Although the Ninth Circuit here purported to follow the "either viewpoint" rule, it severely limited its application in class actions. The Ninth Circuit found that this rule applied only in class actions where there was a "common and undivided interest" in the claim and then narrowly construed the "common and undivided interest" concept. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 958-59 (9th Cir. 2001). The basis for this approach was the Ninth Circuit's conclusion that the "either viewpoint" rule conflicted with the principle of non-aggregation. *Id.* at 958.

Contrary to the findings of the Ninth Circuit, however, the "either viewpoint" rule can be applied in class actions without any offense to *Snyder* and *Zahn*. Neither *Snyder* nor *Zahn* involved a request for equitable relief. Rather, each of these cases addressed the issue of the aggregation of separate and distinct monetary claims by separate parties on one side of a litigation to establish diversity jurisdiction.

In *Snyder*, no individual plaintiff had a sufficient monetary claim to establish diversity jurisdiction. *Snyder*, 394 U.S. at 333. In *Zahn*, only the named class plaintiffs satisfied the jurisdictional minimum and the court consequently held that the federal courts only had jurisdiction over the claims of

these plaintiffs. *Zahn*, 414 U.S. at 292. Relying upon *Snyder*, the *Zahn* court concluded that "any plaintiff who does not [meet the jurisdictional amount] must be dismissed from the case -- 'one plaintiff may not ride in on another's coattails.'" *Zahn*, 414 U.S. at 301 (citing *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)).

In this case, however, the existence of federal diversity jurisdiction does not depend upon aggregating the individual damage claims of each member of the putative class to establish the jurisdictional minimum. Here, it is undisputed that the asserted claims for injunctive relief would require the defendants to spend far in excess of $75,000 if the injunction were entered on behalf of any one plaintiff. *Ford Motor Co.*, 264 F.3d at 960. As no litigant is attempting to ride on the "coattail of another," the non-aggregation principle of *Snyder* and *Zahn* is not violated.

The harmonious application of the non-aggregation and "either viewpoint" rules has been illustrated by decisions in several courts, including the Seventh Circuit. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *see also In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 (D. Md. 2001); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 834-35 (E.D. Mich. 1999). The Seventh Circuit recognized that *Zahn* and *Snyder* prevent aggregation of the defendant's cost of complying with *multiple* claims for injunctive relief, and therefore found that the appropriate standard "is the cost to each defendant of an injunction running in favor of *one plaintiff*." *Brand Name*, 123 F.3d at 610 (emphasis added).

B. The Application of the "Either Viewpoint" Rule in Class Action Injunction Cases Will Not Allow the Circumvention of the Non-Aggregation Principle.

The Ninth Circuit attempted to provide justification for its limitation of the "either viewpoint" rule to only those class actions where there is a "common and undivided" interest by making the policy argument that it would otherwise permit "plaintiffs with minimal damages [to] dodge the non-aggregation rule by praying for an injunction." *Ford Motor Co.*, 264 F.3d at 959. In an opinion by Judge Posner, the Seventh Circuit acknowledged this concern but recognized that it was "misplaced." *Brand Name*, 123 F.3d at 610. Judge Posner explained that in cases involving separate and distinct claims, each claim against a defendant for injunctive relief "must be separately evaluated" and stressed that "[t]he test . . . is the cost to each defendant of an injunction running in favor of one plaintiff"—not to the entire plaintiff class. *Id.*

Moreover, the Ninth Circuit's concern is overstated. Many plaintiffs are happy to stay in state court,[4] where judges commonly are elected and thought to be more responsive to their concerns. Many plaintiffs with an eye on *Snyder* and *Zahn* seek to avoid federal jurisdiction by limiting their damages claim to less than the federal jurisdictional amount, *see, e.g., Brand Name*, 123 F.3d at 607 (noting that plaintiffs were cautious in pleading less than $50,000 in damages), and some plaintiffs join non-diverse litigants to defeat any possible assertion of federal jurisdiction by defendants. *See,*

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[4] *See, e.g.*, Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. Times, Aug. 20, 2001, at A1 (explaining the general preference of plaintiffs' lawyers to litigate in state court and in particular the state of Mississippi which "has gained a national reputation as a place where consumers fare well in court—so well that [it] has become a magnet for liability suits").

e.g., Georgene M. Vairo, *Forum Selection*, Nat'l Law J., Nov. 9, 1998, at B14 (discussing the use of fraudulent joinder of non-diverse parties by plaintiffs to keep cases from being removed to federal court). The recognition by this Court that a structural remedy in compliance with an injunction can establish the minimum amount for diversity jurisdiction will have a self-policing effect: only in those cases where an injunction is a significant element of the desired remedy will there be federal jurisdiction; in the vast majority of cases, the remedy sought still will be only damages, bypassing a non-essential request for injunctive relief to avoid creating a risk of losing the state court forum.

Furthermore, the Court of Appeals mistakenly concluded that the application of the "either viewpoint" approach in class actions involving "separate and distinct" claims would require the courts to recognize the "total detriment" to the defendant (or *all* compliance costs incurred by a defendant to comply with an injunction). *Ford Motor Co.*, 264 F.3d at 959 (internal quotation omitted). The Ninth Circuit apparently reasoned that the recognition of all these costs, which in this case it inexplicably found to constitute "fixed administrative" costs, would permit "every case" to meet the jurisdictional threshold. *Id.* at 960-61. As discussed below, this approach is mistaken, as it fails to recognize the legitimate distinction made by Judge Posner in *Brand Name* between the "structural" and "ministerial" costs of compliance. *See Brand Name*, 123 F.3d at 610. The exclusion of "ministerial" costs to a defendant from the calculation of the pecuniary result of an injunction ensures that only those lawsuits which seek substantive structural relief meet the jurisdictional threshold.

C. The Plaintiffs Have a "Common And Undivided Interest" in the Requested Equitable Relief.

This same unfounded concern for the circumvention of the non-aggregation principle also apparently led the Court of Appeals to construe narrowly claims representing "common and undivided" interests, *Ford Motor Co.*, 264 F.3d at 960, and to reject the principle accepted by numerous courts that a "common and undivided right" is present if the "[d]efendants' costs of compliance do not depend upon the size of the class or the identity of its members." *Cardizem Antitrust Litig.*, 90 F. Supp. 2d at 836; *see also Hoffman*, 19 F. Supp. 2d at 483 ("[B]ecause the defendant will sustain this loss even if only one plaintiff were to obtain the injunction, this is a case where plaintiffs have an undivided interest in the injunction . . . .").

The non-aggregation principle does not apply to claims asserting a "common and undivided interest." *Snyder*, 394 U.S. at 335. Accordingly, where plaintiffs "unite to enforce a single title or right, in which they have a common and undivided interest," the value of the claims of multiple plaintiffs may be considered collectively to meet the statutory threshold. *Zahn*, 414 U.S. at 294 (internal quotation omitted). Here, each plaintiff seeks the same injunctive relief—the reinstitution of the petitioners' rebate program. As such, relief will either be granted or denied as to all plaintiffs. Although structural costs to defendants of re-instituting the program would be the same whether relief were granted to one plaintiff or to many, realistically this relief would less likely be granted to a single plaintiff. Plainly, under these circumstances, the plaintiffs have a "common and undivided interest" in the injunction, which should not be ignored based upon an unfounded concern for future circumvention of the non-aggregation principle. *See, e.g.*, Gibbs v. *E.I. duPont de Nemours & Co.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995)

(finding the plaintiffs' request for injunctive relief, the institution of a common medical monitoring fund, constituted a "common and undivided right").

D. The Rule Applied by the Court Of Appeals Is Illogical, Encourages Duplicative Litigation and Allows Plaintiffs to Manipulate Federal Jurisdiction.

The Ninth Circuit's rule is inherently illogical. Under that rule, a single plaintiff could maintain a federal action if the pecuniary result of an injunction for a defendant exceeded the jurisdictional threshold. This very same plaintiff, however, could not maintain this action in federal court if she decided to promote judicial economy by representing a class or joining with other plaintiffs. The Ninth Circuit itself recognized the anomaly of its approach:

> [L]ogic would dictate that [the "either viewpoint" rule] should apply to all multi-party complaints. While it may seem paradoxical to decline jurisdiction in the multiplaintiff setting, where the potential loss to defendants typically is well beyond the jurisdictional amount threshold, it is implicit in the [non-aggregation] rule . . . that it will sometimes be more difficult for a party asserting federal jurisdiction to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case.

Brand Name, 123 F.3d at 958 (internal citations omitted).[5]

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[5] Contrary to the findings of the Ninth Circuit, it is not implicit in the non-aggregation principle that it may be more *difficult* for a plaintiff in a multi-plaintiff action to establish federal jurisdiction. Rather, this principle holds that the "amount-in-controversy" requirement is not lowered (or made *easier*) for a plaintiff because he has joined with other plaintiffs to bring the action. *Zahn*, 414 U.S. at 301-02; *Snyder*, 269 F.2d at 340-41.

The Ninth Circuit approach also permits plaintiffs to manipulate the diversity jurisdiction requirements to forum shop. If it is advantageous for a plaintiff to be in state court, plaintiffs will simply bring a class action or add other plaintiffs, regardless of the costs of structural injunctive relief. However, if a plaintiff would prefer the federal forum, she will file a single claim for equitable relief in federal court. Plainly, such a rule unfairly prejudices a defendant and subverts the purpose of the "amount-in-controversy" requirement. It also encourages the filing of multiple lawsuits, with the potential for inconsistent results.

The "either viewpoint" rule applied in certain class actions that seek injunctive relief is not a device to evade the limitation on the amount in controversy in federal diversity actions, or to open the federal courts to trivial cases. Rather, it is a recognition that there are some class actions that seek injunctive relief that would not only subject the defendant to substantial cost, but that the injunction, if granted, would force the defendant to forego a benefit or endure a cost that would have to be faced whether injunctive relief were granted to one plaintiff or to thousands. *See, e.g., Earnest* v. *General Motors Corp.*, 923 F. Supp. 1469, 1472-73 (N.D. Ala. 1996) (injunction prohibiting use of allegedly defective engines or engine control modules and requiring replacement by a new line of engines); *Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d at 719 (injunction seeking to compel Microsoft to redesign its operating system to separate a function embedded within it); *Katz* v. *Warner-Lambert Co.*, 9 F. Supp. 2d 363, 364 (S.D.N.Y. 1998) (injunction seeking to compel pharmaceutical research).

E. In Measuring the Pecuniary Result of an Injunction to a Business, The Courts Should Recognize at Least the Structural Costs To Be Imposed on Defendants.

In this case, it has not been disputed that Ford and Citibank would incur costs of in excess of $75,000 to reinstate the rebate program, and would incur additional costs of $75,000 *per month* to maintain the requested rebate center *and* costs significantly in excess of $75,000 to maintain the pertinent computer software systems and software, customer service procedures and training to comply with the requested relief. J.A. 88-89.

The Ninth Circuit accepted that these costs would be incurred if there were only one plaintiff, but then inexplicably disregarded these costs on the basis that they only constituted "fixed administrative costs" which could not be used to satisfy the amount-in-controversy requirement. *Ford Motor Co.*, 264 F.3d at 960-61. Purporting to follow *Brand Name*, the Ninth Circuit reasoned that allowing "fixed administrative costs" such as these to create federal jurisdiction would mean that "every case [seeking equitable relief], however trivial, against a large company would cross the threshold." *Id.* (citing *Brand Name*, 123 F.3d at 610). If the Ninth Circuit is asserting that all costs of complying with an injunction constitute unallowable "administrative costs," then the effect is not merely to eviscerate the either viewpoint rule in class actions seeking injunctions. It would also render that rule inapplicable to most single plaintiff actions seeking an injunction. If the structural costs to be incurred by Citibank and Ford are outside the evaluation process as "administrative," it could be difficult to conceive of any costs of complying with an injunction that are "non-administrative."

In any event, the Ninth Circuit misconstrued both the concerns expressed by Judge Posner, and the decision, in

Brand Name. Judge Posner did indicate that some costs might not be allowed in determining the jurisdictional threshold, but these were carefully limited to "*clerical or ministerial costs of compliance*" because they would allow "every case, however trivial, against a large company" to cross the threshold. *Brand Name*, 123 F. Supp. at 610 (emphasis added).[6] Judge Posner specifically observed that:

> Even if an injunction *doesn't* require the defendant to restructure its business or give up a lucrative lawful business opportunity, *but merely tells it to stop doing something illegal*, such as conspiring to fix prices, there will be lawful costs of compliance. Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed [the jurisdictional minimum].

Id. (emphasis added.) Here, petitioners do *not* seek to establish federal jurisdiction by including any mailing, copying or other "ministerial or clerical" costs or any costs associated with the cessation of alleged illegal activity.

Ministerial or clerical costs can in almost all cases be readily distinguished from other costs, particularly the "structural fixed" costs involved here. Most of the cases that refused to consider injunctive relief as a valid basis for federal diversity jurisdiction involved situations where the cost alleged to satisfy the jurisdictional requirement was an accumulation of small benefits to each of thousands of

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[6] From a defendant's perspective, any costs that will be incurred to comply with an injunction, whether they are deemed to be "ministerial" or "administrative" or "structural," are a burden to the defendant and should be recognized by the Court as such. However, to the extent that courts distinguish between "structural" and "ministerial" costs, the present case clearly constitutes one of the relatively few cases in which the "structural" compliance costs are sufficient to meet the jurisdictional threshold.

plaintiffs, *Snow* v. *Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir. 1977) ($11 kits); *Gilman*, 896 F. Supp. at 510 (order flow payments of pennies a transaction).

This case does not turn on whether a sufficient number of plaintiffs would receive benefits of up to $3500 each (the maximum amount of rebate permitted under the program) to accumulate more than $75,000 in total cost to defendants. Rather, it turns on when and how a court should distinguish from the "accumulation" cases those relatively few instances in which, to put even a single plaintiff in a position to receive the ultimate benefit, the defendant must at the outset expend a substantial sum to alter a manufacturing process, *Earnest*, 923 F. Supp. at 1472-73, or redesign software, *Microsoft Corp. Antitrust Litig.*, 127 F. Supp. at 719, or re-institute an entire rebate program discontinued years ago. *Ford Motor Co.*, 264 F.3d at 960-61. Such requested relief would impose substantial business costs to a defendant, a cost whose magnitude readily satisfies the jurisdictional "matter in controversy [that] exceeds the sum or value of $75,000." 28 U.S.C § 1332(a).

Moreover, there should be few cases where there could be any real confusion between what constitutes "structural fixed" costs and what constitutes "ministerial" costs. There is a readily available lodestar. If the costs would exceed $75,000 in complying with the injunction for a single plaintiff, those could scarcely be ministerial.

In this case, the defendants rightfully seek to have the court recognize the substantial structural costs that they must incur to comply with the requested injunctive relief, specifically the reinstatement of the business apparatus for tracking accrual of rebates, maintaining computer systems for verifying which purchases qualify for rebate accrual, and paying the salaries of individuals engaged in the operation of the rebate program. J.A. 88-89. These are precisely the costs that Judge Posner observed should be recognized in the application of the

"either viewpoint" rule: "Looked at from the defendants' standpoint, the minimum amount in controversy would be present if the injunction sought by the plaintiffs would require *some alteration in the defendant's method of doing business* that would cost the defendant at least the statutory minimum amount." *Brand Name*, 123 F.3d at 609 (emphasis added); *see also Hoffman*, 19 F. Supp. 2d at 475 ("a defendant could show jurisdictional amount by measuring the costs defendant would face if it had to alter its method of business and/or if it had to forego a lucrative transaction") (citing *Brand Name*, 123 F.3d at 609).

Most class action cases seek only damages, and plaintiffs who wish to litigate in state court have ample means to assure that venue under the rules. Even those class action complaints that seek equitable relief do not often request an injunction where the costs to defendant are structural and substantial enough to reach the jurisdictional minimum. This case is not like the majority of class actions such as *Snow*, where the relief sought was an $11 kit, and the record showed that only by embracing the cost of thousands of such kits could the jurisdictional threshold be reached. 561 F.2d at 790-91. To the contrary, in this unusual case, on this record, the evidence is that petitioners would incur costs in excess of the jurisdictional minimum whether the injunctive relief was sought by one plaintiff or by a class of thousands.

F. The Costs Incurred to Comply with an Injunction Should Not Be Prorated Across the Plaintiff Class.

Some courts have purportedly recognized both the "either viewpoint" rule and structural costs in complying with an injunction, but have then negated these determinations by valuing these costs through a proration process across the entire plaintiff class. *See, e.g., Crosby* v. *America Online, Inc.*, 967 F. Supp. 257, 264-65 (N.D. Ohio 1997). In *Crosby*,

the plaintiff class sought an injunction against AOL to prevent it from advertising or selling its services to new customers without an appropriate disclaimer. *Id.* at 260. Because the putative class was composed of approximately 270,000 AOL subscribers, the Court concluded that "the jurisdictional requirement [would] not be met . . . unless it can be said that AOL's cost of complying with the requested injunction will total *20 Billion Dollars*." *Id.* (emphasis added) ($75,000 times 270,000). The *Crosby* decision demonstrates that the proration approach is simply another way – except in the most extraordinary circumstances – to preclude federal jurisdiction in class action injunction cases. If the class of plaintiffs were as few as 1,000 (0.37% of the number in *Crosby*), the costs would need to be over $75 million under the proration approach.

Although the *Crosby* court purported to rely upon *Snyder* and *Zahn* in adopting this approach, it contradicts a fundamental premise of the non-aggregation principle – a claim of one plaintiff should not affect the claim of another for purposes of establishing diversity jurisdiction. Moreover, the *Crosby* approach results in a paradox of the type also created by the Ninth Circuit's analysis: individual plaintiffs may maintain federal jurisdiction, while multiple plaintiffs seeking identical injunctive relief may not.

In addition, this result subverts the purpose of the amount-in-controversy requirement. Plainly, the significance of a lawsuit cannot be diminished by the fact that numerous additional litigants are involved. Nor should a defendant be required to establish that an injunction could cost it hundreds of millions, if not billions, of dollars before it is entitled to invoke federal jurisdiction.

CONCLUSION

For the foregoing reasons, The Business Roundtable, as *amicus curiae*, urges the Court to reverse the order entered by the Court of Appeals, to adopt the "either viewpoint" rule in class action contexts, and to recognize at least the structural costs that would be incurred by defendant businesses to comply with injunctive relief in valuing the amount in controversy in a diversity action.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners.

v.

JOHN B. McCAULEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

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John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3 (1948) 26

Brittain Shaw McInnis, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998) 8

1 James Wm. Moore, *Moore's Federal Practice*, ¶ 0.91(1), at 846 (1st ed. 1978) 5, 6

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae State Farm Mutual Automobile Insurance Company ("State Farm") is one of the largest automobile insurance companies in the United States and does business nationwide. State Farm believes that this brief will assist the Court by providing perspective on the significant detrimental impact that the decision below, if allowed to stand, will have on the insurance industry and on the ability and authority of each State to regulate the business of insurance within its own borders.

In recent years, large insurance companies like State Farm that are engaged in the business of insurance nationwide or in multiple states have faced a marked increase in class action lawsuits, involving putative or certified multi-state or nationwide classes. In these lawsuits, plaintiffs often seek injunctive relief on a class-wide basis that, if granted, may necessitate a fundamental alteration in an insurance company's business operations, requiring changes to computer systems, employee training, and numerous other costs and expenses.

Such suits can be particularly costly to insurance company defendants because of the need for insurance companies to comply with the varying regulatory systems of the different states. Thus, the costs to insurance companies of complying with injunctions may include costs associated

[1] Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, or its counsel, has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief and copies of those consents have been lodged with the Court.

with attempting to make sure that alterations in the companies' operations resulting from court-ordered injunctive relief comport with the applicable state statutes and regulations in each affected jurisdiction. Accordingly, the cost for insurance companies of complying with an injunction in a large class action may well be far in excess of the jurisdictional minimum even if measured by the cost of compliance with respect to a single plaintiff.

The issues raised by injunctive relief sought in class actions against insurance companies, however, go beyond concerns for expenses and costs, but raise constitutional concerns basic to this Nation's federal system. When a single state court judge, elected by the voters of a single county, adjudicates the claims of a nationwide class of policyholders, there is a serious risk that the resulting judgment may impinge upon the prerogative of other states to regulate the business of insurance within their own borders, particularly if the relief granted includes injunctive relief that will affect the defendant insurer's future operations. Such nationwide injunctive relief not only may impose tremendous compliance costs, but also threatens to expose insurance companies to conflicting legal obligations under the differing regulatory systems of the different states.

Accordingly, the issue presented by this case is of major interest to State Farm as a nationwide insurance company, because of the particular impact this Court's decision will likely have on class action litigation involving insurance practices and because of the special costs imposed upon insurance companies in complying with injunctions, given the varying regulatory regimes of the different states.

SUMMARY OF THE ARGUMENT

The decision by the United States Court of Appeals for the Ninth Circuit in this case should be reversed. The Ninth Circuit held that, with only a very narrow exception, a defendant's cost of compliance with injunctive relief sought by the plaintiffs in a class action may not be included in determining the amount in controversy under 28 U.S.C. § 1332. The narrow exception permitted by the Ninth Circuit improperly limits consideration of a defendant's costs of compliance to the relatively tiny category of cases where the underlying claims of the named plaintiffs and class members are common and undivided claims for a limited fund or indivisible res. Contrary to the Ninth Circuit's ruling, whether a claim for injunctive relief is common and undivided (and therefore properly assessed from the defendant's viewpoint) should depend upon the nature of the injunctive relief sought and the character of the plaintiffs' interest in that relief. The Ninth Circuit's ruling is not supported by the language of Congress' grant of diversity jurisdiction to the federal courts in 28 U.S.C. § 1332 and subverts the purposes of Congress' grant of diversity jurisdiction to the federal courts.

The rule adopted by the Ninth Circuit, precluding consideration of a defendant's cost of complying with injunctive relief, will almost invariably result in an artificially low amount in controversy. If allowed to stand, this rule will deprive insurance companies and other corporate defendants of their right to remove to federal court class actions in which they would be required to spend far more than the $75,000 jurisdictional threshold if the injunctive relief sought by the plaintiffs were granted. Moreover, the Ninth Circuit's ruling will deprive such defendants of a federal forum even where the cost of implementing injunctive relief for a single named plaintiff would meet the jurisdictional minimum.

Although the Ninth Circuit states that its rule is intended to keep "trivial" cases out of federal court, the instant case and many of the other cases that will be barred from federal court under the Ninth Circuit's rule are important commercial cases in which substantial monetary amounts are put at stake through the plaintiffs' broad claims for programmatic injunctive relief. Federal diversity jurisdiction and the right of diverse defendants to remove such cases continue to play important roles in protecting out-of-state commercial defendants from bias and in ensuring confidence by business and investors in fair judicial processes. In the case of multi-state or national class actions, federal diversity jurisdiction also serves the federal interest in regulating interstate commerce and in ensuring that states do not intrude on other states' interest in regulating conduct within their own borders.

Such considerations of state sovereignty, comity, and the needs of our Nation's federal system are particularly important in the context of insurance. Both this Court and the United States Congress have recognized that, under this country's federal constitutional system, it is uniquely the prerogative of each state to regulate the business of insurance within its borders. For insurance companies, and for other corporate defendants, the Ninth Circuit's rule threatens to undermine the basic constitutional concerns that underlie the concept of diversity jurisdiction. Permitting the exercise of diversity jurisdiction in cases where costly injunctive relief is sought is necessary to help ensure that out-of-state corporate defendants are safeguarded from the potential biases and overreaching of state court proceedings. For these reasons and the reasons set forth below, State Farm respectfully submits that the Ninth Circuit's decision is erroneous as a matter of law and policy and should be overturned by this Court.

ARGUMENT

I. The Ninth Circuit's Decision Improperly Bars from Federal Court Cases Between Citizens of Different States Where Substantial Pecuniary Interests Are Directly at Stake

Section 1332, 28 U.S.C. § 1332, grants jurisdiction to the federal courts over all civil actions between citizens of different states where the "matter in controversy" exceeds the sum or value of $75,000. The Ninth Circuit's ruling that the "matter in controversy" may not include the defendant's costs of compliance with injunctive relief sought by plaintiffs is inconsistent with the language of section 1332, as elucidated by this Court and the lower federal courts. The Ninth Circuit's ruling also ignores the economic reality of the amount that may be put in controversy by a claim for injunctive relief and disserves the purposes and policies furthered by federal diversity jurisdiction.

A. The Ninth Circuit's Rule Fails to Gauge Accurately the Amount Actually at Stake When Injunctive Relief Is Sought and Is Contrary to 28 U.S.C. § 1332

By requiring a minimum amount in controversy, Congress sought to limit diversity jurisdiction to substantial controversies. A rule that measures the value of injunctive relief only from the viewpoint of the plaintiff, while providing simplicity, may in many cases fail to recognize "the realities of the magnitude of the controversy." 1 James Wm. Moore, *Moore's Federal Practice*, ¶ 0.91(1), at 846 (1st ed. 1978) (as quoted in *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 394 (7th Cir. 1979)). "Since the jurisdictional amount

prerequisite was enacted primarily to measure substantiality of the suit, the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose." *Id.* The Ninth Circuit's ruling, greatly restricting the circumstances in which the cost to the defendant of injunctive relief may be counted toward the jurisdictional minimum in class actions, will keep trivial cases out of the federal courts, but only "by also keeping out cases where great sums of money are involved on the part of the defendant, but not the plaintiff." *See Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 480 (M.D.N.C. 1998).

The "either viewpoint" test, which measures the amount in controversy from either the defendant's viewpoint or from the plaintiff's, better distinguishes large cases from small and thus better effectuates the purposes of the amount-in-controversy requirement. Under the "either viewpoint" rule, "[i]n determining the matter in controversy, [the court] may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 606 (10th Cir. 1940) (footnote omitted).

The present case raises in particular the question of how the value of injunctive relief should be measured where the plaintiffs bring suit on behalf of a putative class, rather than individually. The Ninth Circuit in this case recognized the validity in individual litigation of measuring the value of an injunction from either the plaintiff's or the defendant's viewpoint,[2] but created a rule that essentially nullifies the "either

[2] *See In re Ford Motor Co./Citibank (South Dakota), N.A. Cardholder Rebate Program Litig.*, 264 F.3d 952, 958 (9th Cir. 2001) (Cont'd)

viewpoint" rule for measuring the value of injunctive relief in class actions. In class actions, the Ninth Circuit's rule limits the use of the "either viewpoint" rule to those rare cases where plaintiffs' underlying claims "involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy." *In re Ford Motor Co./Citibank (South Dakota), N.A. Cardholder Rebate Program Litig.*, 264 F.3d 952, 959 (9th Cir. 2001). The Ninth Circuit's rule, if upheld, will mean that in all other cases the pecuniary value of injunctive relief would be the pro rata value to a single class member. In a large class action, that pro rata amount will in virtually every case fail to satisfy the amount in controversy despite the magnitude of compliance costs for the defendant.

The Ninth Circuit's rule is not consistent with the language of section 1332, which neither expressly nor impliedly requires injunctive relief to be measured from the viewpoint of a particular party. Rather, section 1332, granting jurisdiction in all civil actions in which the "matter in controversy" "between" citizens of different States "exceeds the sum or value of $75,000," suggests that matter in controversy between the parties should be defined broadly and take into account both viewpoints or either viewpoint in order to reach a determination that accords with the economic realities. As one commentator has stated:

> [T]he either viewpoint rule is more in line with the plain language of the diversity statute. Section 1332

(Cont'd)

(citing *Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (stating "'the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce'"; "where the value of a plaintiff's potential recovery . . . is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes").

does not contain any language instructing courts as to which party's viewpoint should control the amount in controversy. Critically, it does not state that it should be from the plaintiff's viewpoint. Instead, the statute's central unit of analysis for purposes of determining the jurisdictional amount is drafted in broad terms, "the matter in controversy." . . . [T]his unit of analysis has been interpreted by the Supreme Court to mean "the object of the litigation," that is, what result a judgment will effect. Congress' choice to anchor the amount in controversy to a more general unit of analysis such as the matter in controversy suggests that it did not intend to limit jurisdiction only to cases where plaintiff's alleged value of the claim meets the jurisdictional amount. Thus, the either viewpoint rule mirrors the flexibility inherent in the statute's language.

Brittain Shaw McInnis, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013, 1031 (1998) (footnotes omitted).

A more pragmatic and flexible approach, in contrast to the rigid rule adopted by the Ninth Circuit in the instant case, would "take into account both the factual variances and the numerous types of relief" and recognize "that any one case may be legitimately valued in a number of different ways, no one of which may be said to inherently represent true value in every case." *Hoffman,* 19 F. Supp. 2d at 481. Thus, "[n]o one economic analysis will be right for all cases." *Id.* at 482. Such an approach would be in accord with this Court's decisions stating that "the amount in controversy is measured by the value of the object of the litigation" and

that, generally, the value is measured by the "pecuniary consequences to those involved in the litigation." *Hunt v. Wash. State Apple Comm'n*, 432 U.S. 333, 347 (1977); *Thomson v. Gaskill*, 315 U.S. 442, 447 (1942).

In the instant case, the Ninth Circuit specifically refused to consider the defendants' cost of complying with the injunctive relief at issue, even though "while the monetary benefit to an individual plaintiff of reinstating the rebate accrual program would be relatively insubstantial, the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million." *Ford*, 264 F.3d at 960. The court did not question the factual accuracy of the defendants' assertions as to the cost of compliance, but reasoned that "[i]f the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, 'then every case, however trivial, against a large company would cross the threshold.'" *Id.* (citation omitted). Thus, according to the Ninth Circuit, counting compliance costs toward the amount in controversy would be "fundamentally violative of the principle underlying the jurisdictional amount requirement — to keep small diversity suits out of federal court." *Id.* The Ninth Circuit's reasoning ignores the real, substantial costs that are at issue in the instant case and in similar cases and, as discussed below, exaggerates the possibilities for manipulation of the amount in controversy.

Insurance companies in particular may face compliance costs that far outweigh the value of the injunctive relief to a particular plaintiff. As courts have recognized, injunctive relief in the insurance context can, if granted, "require the defendant to alter his method of doing business." *McCoy v.*

Erie Ins. Co., 147 F. Supp. 2d 481, 492 (S.D. W. Va. 2001). In *McCoy*, the plaintiff sought money damages allegedly due her under her automobile insurance policy for the diminished value of her automobile after repairs paid for by the insurance company defendant. The purported diminished value was well under the jurisdictional minimum. The plaintiff, however, also sought prospective relief in the form of an injunction requiring the insurer to "develop[] procedures and systems with regard to such first-party claims for diminished market value" that would have necessitated "hir[ing] two or more additional appraisers in West Virginia for the purpose of adjusting the diminished value aspect of first-party claims." *Id.* at 493. "Each appraiser would have to be paid a salary and benefits, and would have to be provided with a vehicle for use in extensive company-related travel." *Id.* The court concluded that the compliance cost for the defendant if the injunctive relief sought were granted "would well exceed the jurisdictional minimum." *Id.* at 493.

Similarly, in *Steinberg v. Nationwide Mutual Insurance Co.*, 91 F. Supp. 2d 540 (E.D.N.Y. 2000), the court denied plaintiffs' motion for remand, finding that the amount in controversy was satisfied where plaintiffs sought on behalf of themselves and a putative nationwide class both compensatory damages and prospective injunctive relief prohibiting the defendant insurance company from specifying the use of remanufactured parts in the repair of its insureds' vehicles and from imposing "betterment" charges where the repair resulted in an increase in value. *See id.* at 544. While the court held that the compensatory damage claims could not be aggregated for purposes of determining the amount in controversy, the court found that the "economic impact" of the requested injunction on the defendant amounted to "'millions of dollars annually'" and more than satisfied the

jurisdictional minimum. *Id.* (citing Pl.'s Compl.); *see also In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 718 (D. Md. 2001) (jurisdictional minimum satisfied where defendant had "established that redesigning its operating system software in order to comply with the injunctions requested in each of the removed cases would cost millions of dollars").

In nearly every state, insurance companies are subject to detailed and comprehensive regulations that govern their obligations toward policyholders. Thus, compliance with an injunction affecting those obligations can carry with it substantial associated regulatory costs, in addition to the computer, administrative, personnel and training costs and many other expenses. In cases where plaintiffs assert claims on behalf of a nationwide or multi-state class, the cost of compliance for an insurance company will likely be even more substantial because of variations in state insurance laws and regulations. *See supra* at 1-2. In addition, the costs and constraints imposed upon an insurance company by injunctive relief may potentially have a serious detrimental effect upon the company's ability to compete in interstate commerce against other insurance companies that are not subject to the terms of the injunction.

If the Ninth Circuit's rule is not overturned, courts in many class actions will simply ignore the actual, substantial costs for defendant corporations engaged in interstate commerce of complying with large-scale programmatic injunctive relief. State Farm submits that those costs should appropriately be counted in determining whether the amount in controversy is met. Indeed, permitting the exercise of diversity jurisdiction over cases in which costly injunctive relief is sought is essential to ensure that out-of-state

corporate defendants are protected from the potential biases of state court proceedings. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 111-12 (1945) ("[d]iversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias").

B. Valuing Injunctive Relief from the Viewpoint of the Defendant Does Not Contravene This Court's Decisions in *Zahn* and *Snyder*

The result reached by the Ninth Circuit is not compelled by the non-aggregation rule articulated by this Court in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and *Snyder v. Harris*, 394 U.S. 332 (1969). Neither of those two decisions addressed the issue of how to calculate in a class action the amount put into controversy by a request for injunctive relief. Rather, in those decisions, this Court held that individual monetary damages requested by plaintiffs and class members could not be aggregated for purposes of determining the amount in controversy. *Zahn*, 414 U.S. at 301; *Snyder*, 394 U.S. at 1056-57. Except where compliance costs merely duplicate the cost of paying individual damages to each plaintiff or class member, taking the defendant's cost of compliance into account in determining the amount in controversy is not contrary to the non-aggregation rule of *Zahn* and *Snyder*.

Courts that have taken a class action defendant's cost of complying with an injunction into account for purposes of determining the amount in controversy have harmonized that result with *Zahn* in a number of different ways. Certain courts, such as the Seventh Circuit, have postulated the "one plaintiff" rule. Under the "one plaintiff" rule, where the cost of compliance with regard to one plaintiff would exceed

$75,000, the jurisdictional amount was satisfied, even if the cost of compliance would be the same for one plaintiff or for the entire class. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997). As the Ninth Circuit concedes, the present case meets the "one plaintiff" test. The proposed injunction would require the defendants to alter their method of doing business by reinstating and administering a rebate accrual program under the Ford/Citibank credit card. *Ford*, 264 F.3d at 958. It is undisputed that the cost of doing so would far exceed the jurisdictional amount regardless of whether that relief were provided to just one plaintiff or to the entire class.

Other courts have applied a less restrictive version of the "common and undivided interest" test. Rather than requiring that the plaintiffs' claims be based upon a common fund or other indivisible res (as the Ninth Circuit did in the instant case), these courts have formulated a rule whereby if the injunctive relief would "benefit the putative class as a whole and not just any individual plaintiff," the class would be considered to have a common and undivided interest in the injunctive relief sought. *Earnest v. Gen. Motors Corp.*, 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) (class had undivided interest in injunctive relief in the form of advertising campaign, comprehensive vehicle recall, and injunction forbidding the defendants from using allegedly defective engines and engine control modules); *see also In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 836 (E.D. Mich. 1999) ("Plaintiffs seek injunctive relief that will benefit the class as a whole. Defendants' costs of compliance do not depend upon the size of the class or the identity of its members. Accordingly, it is based upon a common and undivided interest and constitutes an integrated claim; its entire value may be considered when determining whether

the amount-in-controversy requirement for diversity jurisdiction is satisfied"); *Edge v. Blockbuster Video, Inc.*, 10 F. Supp. 2d 1248, 1254-56 (N.D. Ala. 1997) (injunction that would prohibit "course of conduct as a whole" and would inure to the "collective good" of the class was common and undivided and should be valued from defendant's viewpoint for purposes of the amount in controversy); *Loizon v. SMH Societe Suisse de Microelectronics, et Horologerie*, 950 F. Supp. 250, 253-54 (N.D. Ill. 1996) (finding that class members had common and undivided interest in injunctive relief because "[i]n this case only the class, and not the individual class members, could request the injunctive relief"). These courts have properly recognized that certain class rights to injunctive relief can only be pursued as a class and that the class members should be considered to have a common and undivided interest in such relief.[3]

Still other courts have simply seen the non-aggregation rule set forth in *Zahn* as inapplicable to valuing injunctive relief. For example, in *Justice v. Atchison, Topeka & Santa Fe Railway Co.*, 927 F.2d 503 (10th Cir. 1991), the Tenth Circuit acknowledged that the plaintiffs' claims for compensatory damages could not be aggregated, but affirmed the district court's ruling that the plaintiffs' claims for injunctive relief, measured with regard to the defendant's cost of compliance, satisfied the jurisdictional minimum and were properly removed. *Id.* at 505. Likewise, in *McCoy v. Erie Insurance Co.*, 147 F. Supp. 2d 481 (S.D. W. Va. 2001),

[3] The approach taken by these courts finds support in decisions by this Court, such as *Gibbs v. Buck*, 307 U.S. 66 (1939). In *Gibbs*, this Court took a pragmatic approach in determining that the interest of members of an association to "conduct their business though the medium of the Society" represented "a common and undivided interest in the matter in controversy in this class suit." 307 U.S. at 73.

the court found that the "'amount in controversy can be satisfied by demonstrating that the injunctive relief would require the defendant to alter his method of doing business in such a manner that would cost at least the statutory minimum.'" *Id.* at 492. The court in *McCoy* stated that it "makes little sense" to "require[] that the amount in controversy be satisfied even after the financial burden to *the defendant* is apportioned to each plaintiff." *Id.* at 494 n.14 (emphasis in original). *See also Steinberg v. Nationwide Mut. Ins. Co.*, 91 F. Supp. 2d 540, 544 (E.D.N.Y. 2000) (in putative class action, valuing injunctive relief from viewpoint of defendant).

The Ninth Circuit's rule improperly makes it more difficult for a class action to be tried in a federal forum. In the instant case, the Ninth Circuit accepted as true the contention that the cost of complying with the injunction sought by plaintiffs in the present case would not materially differ whether that injunction was entered with respect to a single plaintiff or with respect to many plaintiffs (or indeed the entire proposed class) and that even with respect to a single plaintiff the cost of compliance would exceed the jurisdictional amount. In such circumstances in an individual litigation, it is clear that the jurisdictional amount is met. Nothing in this Court's decisions in *Zahn* or *Snyder* requires that the result be different in a class action. Indeed, *Zahn* and *Snyder* applied the same rule to class actions as is applied in individual litigation and thus suggest that, contrary to the Ninth Circuit, the same rules that apply to valuing injunctive relief for purposes of determining the amount in controversy in an individual case — not more restrictive rules — should apply to class actions.

State Farm submits that where a proposed injunction would require a defendant to change its business practices or methods of operation or to take action with reference to the class as a whole, the claim for injunctive relief should be treated as a common and undivided claim. A rule that the defendant's cost of compliance with such an injunction should be included in determining the amount in controversy best reflects the realities both of the collective nature of the relief and the nature and extent of the matter in controversy between the parties.

C. The Potential for Manipulation of the Value of Injunctive Relief Is Exaggerated by the Ninth Circuit and Does Not Justify the Result in This Case

The chief justification that the Ninth Circuit provides for its rigid rule requiring that the value of injunctive relief must be measured from the plaintiff's viewpoint is that this rule would prevent plaintiffs from manipulating claims for injunctive relief in attempts to manufacture federal diversity jurisdiction. *See Ford*, 264 F.3d at 960-61. The Ninth Circuit's rule is not necessary to achieve this objective. This objective may be best accomplished through the application of established principles of law developed in various contexts to identify sham requests for injunctive relief. For example, when plaintiffs seek injunctive relief that is essentially no more than money damages in "injunctive garb," the amount in controversy may be determined as if only money damages were requested. Thus, in *Campbell v. General Motors Corp.*, the court treated a requested injunction ordering "repair, replacement or refund" as constituting money damages, stating that there is "no meaningful distinction between money damages and in-kind replacement of a defective part." 19 F. Supp. 2d 1260, 1267 (N.D. Ala. 1998); *see also Amerada Hess Corp. v. Department of Interior*, 170 F.3d 1032 (10th Cir. 1999) (claim for injunction ordering refund was a suit for

damages); *Elmco Props., Inc. v. Second Nat'l Fed. Sav. Ass'n*, 94 F.3d 914, 919 n.1 (4th Cir. 1996) (claim for order requiring refund was claim for monetary relief "'dressed in injunctive garb'") (citation omitted).[4]

Likewise, courts have discounted the value of the injunctive relief sought where "[m]ost of the class consists of individuals who do not face further harm" from the defendant's challenged activities. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000).[5] In short, there is a well developed set of legal principles that can effectively prevent manipulation of the amount of controversy by means of a sham claim for injunctive relief.

The potential for manipulation of the amount in controversy through claims for injunctive relief is also limited by the fact that plaintiffs nowadays frequently file class

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[4] *Accord Brazos v. Elec. Power Coop., Inc.*, 144 F.3d 784, 786 (Fed. Cir. 1998) (requested injunction to have defendant "correct bookkeeping entry" was really claim for monetary damages of refund or cancellation of debt); *In re Cordis Corp. Pacemaker Prod. Liab. Litig.*, No. MDL 850, C-3-86-543, 1992 WL 754061, at *8-9 (S.D. Ohio Dec. 23, 1992) (claim for injunctive relief in the form of order to replace allegedly defective pacemakers was "an attempt to cast a claim for monetary damages as one for injunctive relief"); *Motorola, Inc. v. Perry*, 917 F. Supp. 43, 46-47 (D.D.C. 1996) (claim for specific performance was "correctly seen as a request for money damages;" "artful pleading" by plaintiffs could not "convert[] a complaint for monetary relief into a complaint for declaratory or injunctive relief").

[5] *Cf. McIntire v. Ford Motor Co.*, 142 F. Supp. 2d 911, 922 (S.D. Ohio 2001) (injunction ordering defendant not to misrepresent that customers were required to participate in informal dispute resolution before litigating warranty claims had no value to named plaintiffs who had all already litigated warranty claims).

actions in state court. *See, e.g.*, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of it . . . in State Court*, 25 Harv. J.L. & Pub. Policy 143, 145 (2002) (noting that "class action lawyers are bringing a large number of cases in a small number of state courts that have become 'magnets' for interstate class actions and that thus exercise a wildly disproportionate role in adjudicating national disputes").[6] In cases filed in state court where plaintiffs request injunctive relief, they obviously are not attempting to manipulate the amount in controversy. In such cases, the issue of how to value injunctive relief is raised only if a diverse defendant removes to federal court. Possibilities for manipulation are limited in such cases because the plaintiffs, who are seeking to litigate in state court, have not shaped their request for injunctive relief with a view to obtaining federal jurisdiction.

In attempting to ensure that "small diversity suits" are kept out of federal court, *Ford*, 264 F.3d at 961, the Ninth Circuit has fashioned an inflexible rule that will improperly deprive defendants of a federal forum in cases where substantial amounts of money are at stake because of the broad injunctive relief requested. Moreover, the Ninth Circuit has inappropriately created a special rule for class actions that makes it harder to establish that the jurisdictional amount is satisfied than it is in individual litigation, where the Ninth

[6] For example, "in the courts of six small, rural Alabama counties, at least ninety-one class actions were filed over two-year period, often seeking relief on behalf of purported nationwide classes concerning matters of national significance." Beisner & Miller, 25 Harv. J.L. & Pub. Policy 146. The county court of Madison County, Illinois (with a population of approximately 250,000) has experienced a "disproportionately high volume of class actions filings," with an 1850 percent increase of such filings in 2000. *Id.* at 147.

Circuit permits injunctive relief to be valued from the viewpoint of the defendant. *See id.* at 958. With this special and inflexible rule for class actions, the Ninth Circuit has achieved the perverse result that important national or multi-state class actions, involving claims for injunctive relief that may potentially affect the defendant's ongoing manner of doing business nationwide, are kept out of federal court.

II. The Ninth Circuit's Ruling Is Counter to Strong Federal Interests in Fostering and Protecting Interstate Commerce

In its professed zeal to protect the federal courts from small lawsuits, the Ninth Circuit has fashioned a rule that ignores the realities of modern class action litigation and the very real costs imposed upon defendants when injunctive relief is granted. Moreover, the Ninth Circuit's decision raises acute federalism concerns, particularly with respect to multi-state or nationwide class actions involving the heavily regulated insurance industry.

Historically, federal "jurisdiction of controversies between citizens of different States of the Union" served the purpose of "secur[ing] a tribunal presumed to be more impartial than a court of the state in which one litigant resides." *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898).[7]

[7] *See also* The Federalist No. 80, at 537-38 (Alexander Hamilton) ("[I]n order to ensure the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction

(Cont'd)

See also Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 797 (11th Cir. 1999) ("An important historical justification for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court"); *Pease v. Peck*, 59 U.S. (18 Howe) 595, 599 (1856) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has it foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners."). As the Eleventh Circuit acknowledged in *Davis*, that historical justification has not vanished. *See Davis*, 182 F.3d at 797 (apologetically remanding class action to "a state court system that has on occasion produced gigantic awards against out-of-state corporate defendants;" stating that "[o]ne would think that this case is exactly what those who espouse the historical justification for § 1332 would have had in mind, and that this fact would somehow color the statute's interpretation").[8]

(Cont'd)
should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.").

[8] *See also Davis*, 182 F.3d at 799 (Nangle, J., concurring "under protest") (noting that after remand, "[f]acing the possibility of an Alabama jury which occasionally brings in 'gigantic awards' in cases of this sort (as pointed out by the majority), defendants in this case will be under extreme pressure to settle with the only potential obstacle to settlement being plaintiffs' attorneys fees;" "this Judge is of the opinion that the present case law [on determining the amount in controversy] does not adequately accommodate the reality of modern class action litigation and settlements") (footnote omitted).

Indeed, as the Third Circuit has stated, "[f]rom a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998).

In the case of multi-state or national class actions, federal diversity jurisdiction also serves the federal interest in regulating interstate commerce and in ensuring that one state's interests do not intrude on other states' interests in regulating conduct within their own borders. Indeed, the issues presented by class action lawsuits against insurance companies raise constitutional concerns fundamental to this country's federal system. When a single state court judge adjudicates the claims of a nationwide class of policyholders, there is substantial risk that the resulting judgment may impinge upon the right of other states to regulate the business of insurance within their borders, especially if the relief ordered includes injunctive relief that will affect the defendant insurer's future operations. In such cases, diversity jurisdiction's "assurance to non-resident litigants of courts free from susceptibility to potential local bias," *Guaranty Trust Co. of N.Y.*, 326 U.S. at 111-12, not only protects the individual litigant, but protects the federal system as well.

State Farm and many other automobile insurance companies have been named as defendants in nationwide or multi-state class actions in which plaintiffs' claims for injunctive relief threaten to impair the divergent interests of different States in regulating insurance transactions within their borders. For example, a number of insurance companies

are defendants in class actions seeking injunctive relief with regard to claims for "diminished value" (i.e., claims that the plaintiffs' cars have a diminished value even after repairs for collision damage). As the court in *McCoy*, 147 F. Supp. 2d at 493, acknowledged, the requested injunctive relief in a "diminished value" case, if granted, would require programmatic changes in a defendant insurance company's operations, necessitating, *inter alia*, substantial expenditures for hiring and training additional employees, additional computer support, and additional claims investigation. Likewise, in *Steinberg*, 91 F. Supp. 2d at 544, a nationwide class action regarding a defendant insurance company's specification of remanufactured parts to repair its insureds' automobiles, the court recognized that the "economic impact" on the defendant of the injunctive relief sought by the plaintiffs would amount to millions of dollars annually.

The obligations of insurance companies with regard to such issues are governed by the varying regulations and laws of the different States. Thus, nationwide or multi-state injunctive relief regarding such issues would not only impose tremendous compliance costs, but would also threaten to expose insurance companies to conflicting legal obligations. Moreover, such sweeping injunctive relief would impair the prerogative of each individual state, guaranteed by this Nation's federal constitutional system, to make its own decisions with respect to the regulation of insurance with its own borders.

Congress has made clear, through the McCarran-Ferguson Act, that "the continued regulation . . . by the *several* States of the business of insurance is in the public interest." 15 U.S.C. § 1011 (emphasis added). Although the McCarran-Ferguson Act is a limitation on federal interference

with the regulation of insurance by the individual states, it is predicated on the principle that each state should regulate insurance transactions within its borders and that no state may regulate extraterritorially. As this Court has explained,

> [i]t is clear [from the legislative history of the Act] that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where the activity sought to be regulated occurred. *There is no indication of any thought that a State could regulate activities carried on beyond its own borders*.

Federal Trade Comm'n v. Travelers Health Ass'n, 362 U.S. 293, 300 (1960) (emphasis added).

In *Travelers*, this Court found it unnecessary to consider the constitutional limitation on one state's efforts to regulate out-of-state insurance transactions of a domiciliary company, but indicated that "the impediments, contingencies, and doubts which constitutional limitations might create" as to a state's "power to regulate any given aspect of extraterritorial activity" confirmed its conclusion that Congress did not intend to authorize such power. *Id.* at 302. Since *Travelers*, however, this Court has repeatedly made clear in other contexts that the principles of state sovereignty embodied in various provisions of the Constitution prohibit states from attempting to regulate transactions occurring outside their borders. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996) (Alabama could not impose punitive damages for the purposes of forcing defendant to change its practices in other states); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause "precludes the application of a state statute to commerce that takes place

wholly outside of the State's borders"); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York's attempt to "project its legislation" into other states); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transaction occurring entirely outside of Illinois); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) ("[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[i]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful activity and upon which the preservation of which the Government under the Constitution depends.").

Recent studies of insurance-related class action lawsuits filed in state court demonstrate the reality of these constitutional concerns. As commentators noted recently with respect to the numerous class action filings against insurance companies in southern Illinois state courts, "[t]he willingness of certain Illinois state courts to serve as free-roving insurance commissioners and issue edicts that affect the way insurance companies can do business in forty-nine other states may explain why twenty-six class action lawsuits have been filed in Madison County against insurance companies in the last few years." Beisner & Miller, *supra*, at 151. Thus, in one purported nationwide class action brought in Madison County against some twenty insurance companies, "[o]ne Madison County judge could be single-handedly responsible for dramatically increasing the price of automobile insurance for

all Americans and adversely affecting the non-original manufacturer automobile parts industry." *Id.* "The ability of one locally elected judge to exercise that much power raises serious federalism questions." *Id.*

These constitutional concerns underscore the continuing importance of diversity jurisdiction in insurance-related class actions. Moreover, diversity jurisdiction has not decreased in importance with regard to the role it plays in protecting interstate commerce and the national economic system. Rather, diversity jurisdiction has become more important as more companies, such as State Farm, engage in commerce nationwide, and as class action lawsuits more and more often have a significant impact on companies' business operations nationwide. Indeed, as one scholar of the federal court system theorized, the "real key" to the provision by the founders for diversity jurisdiction was their optimistic vision of a future of manufacture and trade within the United States on a vast scale — a future economic order that would both be advanced by the availability of fair federal tribunals and that would have increasing need for such tribunals:

> The real key to the diversity clause lies in the optimism of the founders, an optimism which escapes the label "fantastic" because the dreams so often came true. The members of the Convention did a great deal of anticipating, and on many subjects besides diversity jurisdiction. They anticipated manufacture and trade within the United States on an unknown but vast scale. One of the principal objects of the Convention was to open a path for that expansion. . . . If the Founding Fathers could anticipate the industrial and commercial revolution, already beginning, they could anticipate some of the

> obstacles to the success of the concomitant business enterprise. The diversity clauses were based on that dual anticipation more largely than on experience.

John P. Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 27 (1948).

The rule adopted by the Ninth Circuit bars defendant companies from federal court in cases where broad injunctive relief is sought that may have substantial monetary impact not only upon the defendant's business operations conducted within the forum state but also upon business operations in other states or nationwide. The Ninth Circuit's ruling relegating such cases to state court disserves the significant federal constitutional interest in adjudicating such cases and should be overturned.

CONCLUSION

For all the foregoing reasons, *amicus curiae* State Farm respectfully submits that the judgment of the Court of Appeals for the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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IN THE

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FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

—v.—

JOHN B. MCCAULEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

The Pharmaceutical Research and Manufacturers of America (PhRMA) submits this brief as *amicus curiae* in support of petitioners. All parties have consented to the filing of this *amicus curiae* brief pursuant to letters filed with the Clerk of the Court.[1]

[1] This brief was authored by the *amicus* and counsel listed on the cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus*, its members, or its counsel made any monetary contributions to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association that represents the country's leading research-based pharmaceutical and biotechnology companies.[2] PhRMA's members invent and market medicines that enable patients to lead longer, healthier and more productive lives.

The Ninth Circuit held that the defendant's costs of complying with injunctive relief in a class action cannot determine the amount in controversy. PhRMA's members are concerned that this ruling improperly contracts the diversity jurisdiction of the federal courts. The Ninth Circuit acknowledged that the costs of complying with injunctive relief can count toward the jurisdictional minimum in "single plaintiff" and "multiple plaintiff cases." Pet. App. 8a-9a, 12a (internal quotations omitted). The Ninth Circuit nonetheless held that applying the same rule in class actions "is fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." Pet. App. 12a. The Ninth Circuit adhered to this reasoning even though, according to petitioners, the costs of providing injunctive relief to one or all class members would exceed the $75,000 jurisdictional threshold. Pet. App. 12a. In other words, under the Ninth Circuit's rule, each plaintiff's claim becomes jurisdictionally insufficient when joined in a class action even though each would be jurisdictionally sufficient if asserted in an individual suit or if joined pursuant to other federal rules.

[2] PhRMA's brief is submitted on behalf of PhRMA members Abbott Laboratories, Allergan, Inc., Amersham Health, Amgen Inc., AstraZeneca LP, Aventis Pharma AG (and subsidiaries), Bayer Corporation Pharmaceutical Division, Berlex Laboratories, Inc., Bio-Technology General Corp., Biogen, Inc., Boehringer Ingelheim Pharmaceuticals, Inc., Bristol-Myers Squibb Company (and subsidiaries), Elan Pharmaceuticals, Inc., Eli Lilly and Company, Fujisawa Healthcare, Inc., Genzyme Corporation, Gilead Sciences, Inc., GlaxoSmithKline, Hoffmann-La Roche Inc., Johnson & Johnson (and subsidiaries), Merck & Co., Inc. (and subsidiaries), Novartis Pharmaceuticals Corporation, Organon Inc., Otsuka America Pharmaceutical, Inc., Pfizer Inc., Pharmacia Corporation, The Procter & Gamble Company, Purdue Pharma L.P. (and subsidiaries), Sanofi-Synthelabo Inc., Schering-Plough Corporation, SCHWARTZ PHARMA, INC., Serono, Inc., Solvay Pharmaceuticals, Inc., Wyeth (and subsidiaries), and 3M Pharmaceuticals.

The Ninth Circuit's holding, which is erroneous for the reasons shown below, particularly concerns PhRMA because its members are frequently subject to state law consumer suits seeking redress for harms allegedly caused by those members' products, marketing efforts, or other conduct. Such suits can take the form of class actions seeking extensive injunctive relief. For example, plaintiffs have invoked state law to compel PhRMA members to change the labels of FDA-approved products, *see, e.g.*, *Kanter* v. *Warner-Lambert Co.*, 265 F.3d 853 (9th Cir. 2001), to engage in "corrective" advertising, *see, e.g.*, *Risti* v. *Novartis Consumer Health, Inc.*, No. MID-L-4053-01 (N.J. Super. Ct. Law Div., Compl. filed Apr. 30, 2001), to mandate provision of court-supervised medical-monitoring services, *see, e.g.*, *Dawalt* v. *Purdue Pharma, L.P.*, No. 01-c1-01463 (Ky. Cir. Ct., Compl. filed Nov. 26, 2001), to cease and desist from particular marketing practices, *see, e.g.*, *Dawson* v. *Ciba-Geigy Corp.*, 145 F. Supp.2d 565 (D. N.J. 2001), and to terminate alleged agreements in unreasonable restraint of trade and to alter business practices, *see, e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997).

These types of suits can hardly be characterized as "small diversity suits." Pet. App. 12a. To the contrary, the injunctions these suits seek can have enormous consequences. Such injunctions may require companies to reorder their conduct on a national or even international level. Thus, even though based on state law, these suits can have profound implications for the nation's welfare and public policy. Compliance with the injunctions demanded, moreover, often will cost PhRMA's members well in excess of $75,000 whether relief is awarded to one plaintiff or many. For instance, plaintiffs in one action sought as part of court-supervised medical monitoring relief to compel a PhRMA member *inter alia* to "fund[ ] * * * studies of the long-term effects" of a particular drug as well as to "provid[e] for the creation, maintenance, and operation of a registry in which relevant medical information" relating to that drug is made available.[3] The costs of funding studies and creating a registry cannot be lowered by reducing the number of plaintiffs. PhRMA's members, however, have had their controversies excluded from the federal courts by the Ninth Circuit's rule that compliance costs cannot count towards the jurisdictional minimum in class actions. *See, e.g.*, *Kanter* v. *Warner-Lambert Co.*, 265 F.3d 853, 861 (9th Cir. 2001). PhRMA and its members accordingly have a keen interest in this Court's clarification of the appropriate rules for determining the amount in controversy when plaintiffs join in a putative class and seek injunctive relief.

[3] *Dawalt* v. *Purdue Pharma, L.P.*, No. 01-c1-01463 (Ky. Cir. Ct., Compl. filed Nov. 26, 2001) (Complaint ¶ 139).

SUMMARY OF ARGUMENT

This Court should hold that the Ninth Circuit erred in excluding the defendant's costs of complying with injunctive relief from the amount in controversy in class actions. The Ninth Circuit rightly recognized that "matter in controversy," 28 U.S.C. § 1332(a), generally must be assessed from "either viewpoint" and accordingly can include the defendant's costs of complying with injunctive relief. The diversity statute on its face does not distinguish between the interests of plaintiffs and defendants and thus is most naturally read to include the defendant's costs of meeting an injunction. Compliance costs often express most tangibly the "value of the object of the litigation," the test for determining the "amount in controversy" when a plaintiff seeks injunctive relief. *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). Examining "either viewpoint" furthers the purpose of the amount-in-controversy requirement: to ensure that trivial controversies do not clog the federal courts. *See* 14B Charles A. Wright, *et al.*, Federal Practice and Procedure § 3703, at 124 (3d ed. 1998). Evaluating "either viewpoint" rather than just the plaintiff's avoids "blind[ing] federal courts to the realities of the magnitude of the controversy." *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389, 394 (7th Cir. 1979) (internal quotations omitted).

Despite acknowledging that the "either viewpoint" rule applies in single or other "multiple plaintiff cases," the Ninth Circuit mistakenly concluded that the "either viewpoint" rule could not be applied in a class action consistently with the nonaggregation rule of *Snyder* v. *Harris*, 394 U.S. 332 (1969). Pet. App. 8a-9a, 12a. The diversity statute on its face makes no distinction between class actions and other actions. The rule forbidding the aggregation of separate and distinct claims provides no

basis for creating that distinction. As Judge Posner has explained, both the "either viewpoint" rule and *Snyder* are respected when "the cost to each defendant of an injunction running in favor of one plaintiff" exceeds the jurisdictional minimum. *In re Brand Name Prescription Drug Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997). No impermissible aggregation occurs because in a class action "the defendant * * * is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *Id.* Accordingly, when the same costs must be expended to provide relief to one plaintiff or many, those costs properly are attributed to *each* plaintiff's claim. Under the "either viewpoint" rule, therefore, jurisdiction is not based on the aggregation of separate and distinct claims, but rather on the "separate[ ] evaluat[ion]" of the sufficiency of individual claims, as *Snyder* directs. *Id.*

The Ninth Circuit's misplaced fear of an "inherent conflict" between the "either viewpoint" rule and *Snyder* led the court to contravene the very principle *Snyder* applied: that the federal rules cannot " 'extend or limit' " federal jurisdiction. 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). Under the Ninth Circuit's rule, compliance costs can meet the amount-in-controversy requirement when plaintiffs seek injunctive relief individually or in other "multiple plaintiff cases" but not when their claims are joined in a Rule 23 class action. *Snyder*, however, recognizes that Rule 82 prohibits applying Rule 23 either " 'to extend *or limit*' " federal jurisdiction. 394 U.S. at 337 (quoting Fed. R. Civ. P. 82) (emphasis added). By refusing to apply the "either viewpoint" rule when claims are joined in a Rule 23 class action, and thereby divesting the courts of jurisdiction over claims that are jurisdictionally sufficient when brought in other ways, the Ninth Circuit achieved precisely the contraction of jurisdiction that Rule 82 and *Snyder* forbid.

The Ninth Circuit also incorrectly feared that applying the "either viewpoint" approach in class actions potentially federalizes "every case, however trivial, against a large company" in violation of Congress's presumed intent. Pet. App. 12a (internal quotations omitted). The "either viewpoint" rule does not move to federal court every such case because not every injunction defendants confront requires expending more than $75,000 whether one plaintiff or many prevail. Moreover, the "either viewpoint" rule is faithful to Congress's purpose of providing "access to a Federal forum" for "claims with substantial amounts at issue." S. Rep. No. 104-366, at 29-30 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4209. When each claim exceeds the jurisdictional minimum because the same costs, in excess of that minimum, must be expended no matter how many plaintiffs sue, "substantial amounts" plainly are "at issue" for each "claim." *Id.* By contrast, the Ninth Circuit's exclusion of otherwise jurisdictionally sufficient claims from the federal courts merely because they are asserted in a Rule 23 class action disregards the federal courts' "virtually unflagging obligation * * * to exercise the jurisdiction" Congress conferred. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976).

ARGUMENT

I. THE NINTH CIRCUIT CORRECTLY RECOGNIZED THAT THE PLAIN MEANING OF "MATTER IN CONTROVERSY" REQUIRES CONSIDERING THE VIEWPOINT OF EITHER PARTY INCLUDING THE DEFENDANT'S COSTS OF COMPLYING WITH INJUNCTIVE RELIEF

The Ninth Circuit agreed that determining "matter in controversy," 28 U.S.C. § 1332(a), generally requires examining "either viewpoint" and, therefore, that the amount in controversy can include "the potential cost to the defendant of complying with [an] injunction" Pet. App. 7a.[4] For several reasons, the Ninth Circuit's reading of the diversity statute to require consideration of "either viewpoint," *i.e.*, "the pecuniary result to either party which the judgment would directly produce," Pet. App. 7a, is correct. First, it is the natural reading of the

[4] The diversity statute, 28 U.S.C. § 1332(a), presently provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

statutory language and best serves the purposes of the amount-in-controversy requirement. Second, the alternative "plaintiff's viewpoint only" approach creates anomalies Congress could not have intended to foster, and complicates rather than simplifies the jurisdictional inquiry.

The federal diversity statute long has provided for federal jurisdiction only if "the matter in controversy" exceeds a particular "sum or value." 28 U.S.C. § 1332(a).[5] This language does not distinguish between the value to plaintiffs or defendants and thus is naturally read to include the costs to defendants of complying with injunctive relief—the "value" of the "matter" to that party. To construe "matter in controversy" to permit examining only the plaintiff's viewpoint and to compel ignoring the defendant's writes into the statutory text a limitation Congress did not make. The "well established" rule that "[i]n actions seeking declaratory or injunctive relief" the "amount in controversy is measured by the value of the object of the litigation," *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977), reinforces reading the statute to require examining "either viewpoint." When the "object of the litigation" is to compel the defendant's implementation of an injunction, the "value" can be measured from either the plaintiff's perspective (benefit received) or the defendant's perspective (cost incurred).

Reading "matter in controversy" to require examining "either viewpoint" also comports with "the purpose of a jurisdictional amount in controversy requirement—to keep trivial cases away from the federal court system." 14B Charles A. Wright, *et al.*, Federal Practice and Pro-

[5] *See generally* Richard H. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and the Federal System 1542 (4th ed. 1996).

cedure § 3703, at 124 (3d ed. 1998). As Wright and Miller explain, this purpose "is satisfied" when "the case is worth a large sum of money to either party." *Id.*; *see also* Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 Harv. L. Rev. 1369, 1372 (1960) ("[T]he effectuation of the statutory purpose seems to warrant attention to the most, rather than to the least, valuable interest in stake."). When the defendant's costs of implementing injunctive relief run into the millions, the controversy hardly can be called "trivial" regardless of how the plaintiff values the relief. By contrast, reading the statute to require examining only the plaintiff's interest can "blind federal courts to the realities of the magnitude of the controversy." *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389, 394 (7th Cir. 1979) (internal quotations omitted).

The "either viewpoint" rule is also a proper reading of the statute because the "plaintiff's viewpoint only" rule creates anomalies Congress could not have intended. *See, e.g., Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 278 (1995) (statutes should be read to avoid "anomalous" results). As one commentator observes, "in the many instances in which either party might have initiated the proceeding, it seems irrational to consider the plaintiff's interest exclusively, and such a practice may well provoke a race to the courts." Note, *supra*, 73 Harv. L. Rev. at 1373. Such "irrational" "races to the court" occur, for instance, when either party could bring an action seeking injunctive relief concerning the same property and only one party values the property over the jurisdictional amount. *Id.* at 1372-73. Under the "plaintiff's viewpoint only" rule, the existence of diversity jurisdiction in such a case would depend on the fortuity of which party happened to "win" the race to file a case

first.[6] The "either viewpoint" rule, by contrast, avoids such anomalous results.

Finally, some courts and commentators have suggested that a "plaintiff's viewpoint only" rule offers greater predictability and simplicity. *See, e.g., Kheel* v. *Port of New York Auth.*, 457 F.2d 46, 48-49 (2d Cir. 1972); Armistead M. Dobie, *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733, 736 (1925). But the rule has precisely the opposite consequence. A "plaintiff's viewpoint only" rule makes the court's task harder because determining the value a plaintiff places on an injunction can be "extremely difficult to assess." Note, *supra*, 73 Harv. L. Rev. at 1373-74; *see also, e.g., Committee of GI Rights v. Callaway*, 518 F.2d 466, 472-73 (D.C. Cir. 1975). The "either viewpoint" rule avoids this defect because "in some cases the presence of a readily ascertainable value to the defendant may eliminate the necessity of a highly speculative judgment as to the value to the plaintiff." Richard H. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and the Federal System 1550 (4th ed. 1996); *accord* Note, *supra*, 73 Harv. L. Rev. at 1373-74.

Accordingly, the Court should hold that the "value of the object of the litigation" may be assessed from the

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[6] The Harvard Law Review Note explains how, under the "plaintiff's viewpoint only" rule, the party with a jurisdictionally sufficient interest in the matter may be deprived of a federal forum simply because the party with a jurisdictionally *in*sufficient interest sues first in state court. If the defendant in the state court case initiates its own federal action, "the federal court might grant a stay by reference to the federal policy expressed in rule 13(a); or, if the defendant's claim is a compulsory counterclaim under the law of the state in which the plaintiff's action is brought, the federal court may be required to dismiss. Either of these dispositions effectively deprives the defendant of a federal adjudication." Note, *supra*, 73 Harv. L. Rev. at 1379 (footnote omitted).

perspective of either the plaintiff or defendant and can include the defendant's compliance costs..

II. THE NINTH CIRCUIT ERRED IN CREATING A CLASS ACTION EXCEPTION TO THE "EITHER VIEWPOINT" RULE

The Ninth Circuit agreed that, as demonstrated above, the diversity statute generally requires considering "either viewpoint" and, therefore, that the defendant's compliance costs generally can establish the amount in controversy. Pet. App. 7a-8a. The Ninth Circuit's understanding that the statute requires examining "either viewpoint" should have led the court to apply that same reading of the statute in a Rule 23 class action. The diversity statute makes no exception for class actions; and "the basic canon of statutory construction" is that the meaning of a particular statutory term must remain the same even when applied in different settings. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (citations omitted); *see also, e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994); *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 4-6 (1st Cir. 1997).

The Ninth Circuit, however, ignored this "basic canon of statutory interpretation" and held that the "either viewpoint" rule does not apply when plaintiffs join their claims in a Rule 23 class action even though the "either viewpoint" rule properly applies in "single plaintiff" and other "multiple plaintiff cases." Pet. App. 8a-9a (internal quotations omitted). The Ninth Circuit believed this class action exception was compelled by an "inherent conflict" it detected between the "either viewpoint" rule and this Court's decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969). *See* Pet. App. 8a-9a; *see also* Op. 11 ("[T]he Ninth Circuit * * * refused to extend application of the 'either viewpoint' rule to class actions because of the

nonaggregation principle established by this Court."). The Ninth Circuit also reasoned that applying the "either viewpoint" rule in a class action "is fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." Pet. App. 8a, 12a. The Ninth Circuit's two reasons for departing from the "either viewpoint" rule are misconceived.

A. The Ninth Circuit's Exception to the "Either Viewpoint" Rule is Contrary to and Not Mandated by *Snyder* and Violates Federal Rule of Civil Procedure 82

As an initial matter, *Snyder* provides no basis for the Ninth Circuit's departure from the "either viewpoint" rule. To the contrary, the Ninth Circuit's creation of a class action exception to the "either viewpoint" rule flouts the very principle that *Snyder* applied: that the federal rules cannot " 'extend or limit' " federal jurisdiction. 394 U.S. at 337 (quoting Fed. R. Civ. P. 82).

1. First, applying the "either viewpoint" rule in a class action comports with *Snyder* because that rule does not threaten aggregation. In *Snyder*, this Court held that the amount-in-controversy requirement in a class action cannot be met by aggregating separate and distinct claims. 394 U.S. at 337-40. As Judge Posner has explained, the "either viewpoint" rule implements *Snyder* when "the cost to each defendant of an injunction running in favor of one plaintiff" exceeds the jurisdictional threshold. *In re Brand Name Prescription Drug Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997). When the costs to a defendant of supplying the same relief to one plaintiff or many meets the amount-in-controversy requirement, *Snyder* is respected because *each* plaintiff's

claim, in such circumstances, is jurisdictionally sufficient. *Id.*[7]

The reason that the cost of an "injunction running in favor of one plaintiff," *In re Brand Name*, 123 F.3d at 610, determines the jurisdictional sufficiency of each class member's claim is that, as *Snyder* explains, a Rule 23 class action is simply a form of joinder. *See Snyder*, 394 U.S. at 337, 340. Joinder does not change the amount in controversy of each separate claim joined. *See* 7 Charles A. Wright, *et al.*, Federal Practice and Procedure ("Wright & Miller") § 1659, at 456-58 (3d ed. 2001). For example, if two plaintiffs sue separately to abate the same nuisance and the defendant's costs—should either prevail—exceed $75,000, then under the "either viewpoint" rule each claim would meet the amount-in-controversy requirement. The amount in controversy in each claim is not affected by the joinder of those claims in a single action, even though both plaintiffs seek to compel the defendant to engage in the same act. *See Snyder*, 394 U.S. at 336 (" 'When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be the requisite jurisdictional amount * * *.' " (alteration in original) (quoting *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911))); *see also, e.g., Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 154 (4th Cir. 1995) ("That both of [plaintiff's] claims are combined in one complaint does not by itself defeat the subject matter jurisdiction the court would have had over separate suits."); *Williams v. Conseco, Inc.*, 57 F. Supp.2d 1311, 1317 (S.D. Ala. 1999) ("[I]t is incoherent to suggest that each of the

[7] Because each plaintiff's claim is jurisdictionally sufficient under the "either viewpoint" rule, no issue is raised under *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), even assuming *Zahn* remains good law, an issue this Court need not reach.

seven claims in the complaint could have been brought in federal court individually, but can not be brought under the same civil action via Fed. R. Civ. P. 20."). *See generally* 7 Wright & Miller, *supra*, § 1659, at 449 ("Subject-matter jurisdiction problems do not arise when each of the claims by or against * * * joined parties rests on an independent jurisdictional ground.").

The same is true when plaintiffs join separate and distinct claims for injunctive relief through a putative class action. "Whatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *In re Brand Name*, 123 F.3d at 610. Each class member's injunctive claim, in other words, is deemed to seek the same relief from the defendant. Just as when claims are joined pursuant to other rules, if the same costs must be incurred to supply the same injunctive relief to one plaintiff or many, then those costs are properly viewed as part of the amount in controversy of each plaintiff's claim. *Id.*

Because each claim is jurisdictionally sufficient when the costs "of an injunction running in favor of one plaintiff" exceed $75,000, the supposed "inherent conflict" the Ninth Circuit detected (Pet. App. 8a) between *Snyder* and applying the "either viewpoint" approach in class actions does not exist. *See In Re Brand Name*, 123 F.3d at 610. Jurisdiction is based not on an impermissible aggregation of the amount in controversy of separate claims, but rather the jurisdictional sufficiency of individual claims, as *Snyder* directs. *See Snyder*, 394 U.S. at 337-38.

2. Second, *Snyder* actually refutes the Ninth Circuit's class action exception because it violates the very prin-

ciple *Snyder* applied: that the federal rules cannot expand or contract federal jurisdiction. Rule 82 provides that the Federal Rules of Civil Procedure " 'shall not be construed to extend or limit the jurisdiction of the United States district courts.' " *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). In *Snyder*, this Court applied Rule 82 to decline to except Rule 23 class actions from the rule forbidding aggregation of separate and distinct claims. *Id.* at 338. This Court reasoned that, because the nonaggregation rule is derived from the amount-in-controversy statute, a Rule 23 exception would impermissibly alter the jurisdiction of the federal courts. *Id.* at 337-38.

Yet, just as *Snyder* recognizes that the federal rules cannot *extend* federal jurisdiction, so too *Snyder* recognizes that the federal rules cannot *limit* that jurisdiction. As *Snyder* states, to apply the federal rules "to effect a change in the definition of 'matter in controversy' would clearly conflict with the command of Rule 82 that 'these rules shall not be construed to extend *or limit* the jurisdiction of the United States district courts.' " *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82) (emphasis added). Indeed, *Snyder* observes, under Rule 82 any change in the interpretation of "matter in controversy" that applies "in class action cases under Rule 23 would inescapably have to be applied as well to the liberal joinder provisions of Rule 20 and to the joinder of claims provisions of Rule 18." *Id.* at 340.

The Ninth Circuit's class action exception to the "either viewpoint" rule achieves precisely the contraction of jurisdiction *Snyder* forbids. Even if each claim asserted by each plaintiff independently meets the amount-in-controversy requirement, under the Ninth Circuit's rule the federal courts are without power to adjudicate those claims when they are joined in a Rule 23 class action. This refusal to apply the "either viewpoint"

rule in a class action is a "change in the definition of 'matter in controversy' " based on application of a federal rule and, therefore, improperly " 'limit[s]' " the jurisdiction of the federal courts. *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). Whether separate and distinct claims are asserted by each plaintiff independently, joined under Rules 18 or 20, or joined pursuant to Rule 23, Rule 82 requires applying the same definition of matter in controversy. *See Snyder*, 394 U.S. at 340.[8]

B. Application of the "Either Viewpoint" Rule Comports with Congress's Intent and Does Not Threaten to Federalize Every Class Action Alleging Violations of State Law

The Ninth Circuit's contraction of federal jurisdiction not only violates Rule 82, but also is based on a false premise. The court feared that applying the "either viewpoint" rule in class actions seeking injunctive relief would permit "every case, however trivial, against a large company" to be brought in federal court, Pet. App. 12a (internal quotations omitted), in violation of Congress's presumed intent. The Ninth Circuit's prediction is wrong; and the court's exclusion of compliance costs from the calculation of the jurisdictional amount in class actions subverts rather than furthers Congress's design.

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[8] Fidelity to Rule 82 also defeats respondents' suggestion (Op. 14) that their claims for injunctive relief should be disregarded for amount-in-controversy purposes in a class action because injunctive relief is not "the primary object of this litigation." The plaintiff's motive for seeking injunctive relief does not affect the costs to the defendant of complying with such relief if ordered; and, as explained above in Point I, the amount in controversy is properly determined from either viewpoint.

1. Contrary to the Ninth Circuit's fear, proper application of the "either viewpoint" rule does not move every claim against a major company based on state law to federal court. Plaintiffs do not invariably bring class actions or seek injunctive relief. Moreover, there are many claims for injunctive relief that do not threaten to impose costs on defendants that invariably exceed the jurisdictional threshold. These include, for instance, actions in which plaintiffs seek specific performance of separate and distinct contracts in which the amount due under each is below the jurisdictional minimum. The costs of compliance for a single plaintiff in such a case is simply the value of a particular contract and the amount in controversy in such a case would not be met. *See, e.g.*, *Griffith* v. *Sealtite Corp.*, 903 F.2d 495, 497-98 (7th Cir. 1990); *Glover* v. *Johns-Manville Corp.*, 662 F.2d 225, 231-32 (4th Cir. 1981); *Eagle Star Ins. Co.* v. *Maltes*, 313 F.2d 778, 779-81 (5th Cir. 1963). Another example of a type of case that does not invariably meet the amount-in-controversy threshold is a class action seeking to compel a defendant simply to ship to each plaintiff a cheap replacement part already sitting on a shelf. If the costs of providing the part to one plaintiff do not exceed $75,000, compliance costs alone cannot meet the jurisdictional minimum if the case involves separate and distinct claims, even if the defendant's total costs exceed that amount. Compliance with a cease and desist order, too, will not always cost $75,000 to provide relief to a single plaintiff.

By contrast, in other cases the costs of complying with injunctive relief may be substantial whether one or more plaintiffs prevail. In these cases, the costs that must be incurred to provide relief to *any* plaintiff—the "fixed costs"—are part of the value of each plaintiff's claim because each claim, in effect, is for that relief. For instance, when a defendant must spend in excess of

$75,000 to re-label a product, *see, e.g.*, *Kanter* v. *Warner-Lambert Co.*, 265 F.3d 853 (9th Cir. 2001), those costs are properly attributable to each plaintiff's claim and the amount in controversy would be met. So too, injunctive relief seeking to compel a defendant to "fund[ ] * * * studies of the long-term effects" of a particular drug and to "provid[e] for the creation, maintenance, and operation of a registry" making available information relating to that drug,[9] plainly requires expending sums well in excess of $75,000 whether there is one plaintiff or many and whether claims are asserted in individual suits or in a multiple-plaintiff action. Other examples of injunctive relief that can involve high fixed costs properly attributable to each plaintiff's claim include requiring a defendant to develop a medical monitoring facility and program, compelling a company to redesign its products, *see, e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp.2d 702, 719 (D. Md. 2001), or directing a company to redesign and manufacture new parts to repair an assertedly defective device.[10]

2. The assertion of federal jurisdiction over these class actions—controversies in which the cost of pro-

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[9] *Dawalt* v. *Purdue Pharma, L.P.*, No. 01-c1-01463 (Ky. Cir. Ct., Compl. filed Nov. 26, 2001) (Complaint ¶ 139).

[10] There may be cases in which a particular remedy is unavailable to a single plaintiff. But when "*only* the class as a whole is entitled to the relief requested," *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250, 252-53 (N.D. Ill. 1996) (emphasis added) (internal quotations omitted), plaintiffs surely have "unite[d] to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335. Indeed, circumstances in which the recovery of one "depend[s] upon the recovery of others" describes one classic category of "common and undivided interest" cases. *Shields* v. *Thomas*, 58 U.S. 3, 5 (1854). In such circumstances, the amount in controversy may be based on the defendant's total detriment consistent with *Snyder*'s nonaggregation rule. *See Snyder*, 394 U.S. at 335.

viding relief to even a single plaintiff exceeds $75,000 and therefore each plaintiff's claim is jurisdictionally sufficient—is faithful to the balance Congress struck in maintaining diversity jurisdiction for "claims with substantial amounts at issue," S. Rep. No. 104-366, at 29-30 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4209, while periodically adjusting the jurisdictional threshold.[11] Cases in which plaintiffs seek to compel a defendant to redesign its internationally-marketed products, relabel its FDA-approved products, or fundamentally alter the conduct of its business, hardly can be characterized as "small diversity suits," Pet. App. 12a, or exclusively "local controversies," *Snyder*, 394 U.S. at 340. The relief sought in such disputes often implicates the defendant's operations well beyond the State whose laws the plaintiffs invoke and can have profound implications for the nation's welfare and public policy. To provide the option of adjudicating such disputes in federal court when each class claim crosses the jurisdictional threshold does not "fritter away" those courts' resources in "the trial of petty controversies." S. Rep. No. 58-1830, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101, and thus preserves the core value the amount-in-controversy requirement serves. By contrast, the Ninth Circuit's exclusion of jurisdictionally sufficient claims from the federal courts in the name of excising "small diversity suits" (Pet. App. 12a) abdicates the federal courts' "virtually unflagging obligation * * * to exercise the jurisdiction" Congress conferred.

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[11] *See, e.g.*, S. Rep. No. 104-366, at 29-30 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4209 (Report accompanying bill increasing amount-in-controversy requirement to $75,000); H.R. Rep. No. 100-899, at 44-45 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6004-06 (same with respect to increase to $50,000); S. Rep. No. 58-1830, at 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3101 (same with respect to increase to $10,000).

Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800, 817 (1976).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit or vacate that judgment and remand the matter for application of the correct legal standard for assessing the amount in controversy.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA) N.A.,

Petitioners,

v.

JOHN B. MCCAULEY, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether the cost to the defendant of complying with an injunction sought by a plaintiffs' class may satisfy the amount-in-controversy requirement of the diversity statute, where such compliance would cost the defendant more than the $75,000 minimum whether it covered the entire class or any single member of the class.

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Fed. R. Civ. P. 82 ..... 6, 17

SCHOLARLY AUTHORITIES

Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001 (1974) 26

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John A. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2001) 22, 27

William A. Braverman, *Janus Is Not A God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. Rev. 1072 (1993) 25

Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* (1997) .. 22

Stephen Daniel Kaufmann, Comment, *"Federalizing" Class Actions: The Future of the Jurisdictional Requirements For Diversity-Based Class Actions*, 52 Ala. L. Rev. 1029 (2001) 26

Brittain Shaw McInnis, *The $75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998) 25

Carter G. Phillips et al., *Rescuing Multidistrict Litigation From the Altar of Expediency*, 1997 BYU L. Rev. 821 (1997) 26, 27

Mark P. Robinson, Ass'n of Trial Lawyers of Am., *MDL, Class Actions, and Competing Interests of State Litigation* (2001) 28

Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000) 21, 25

Edward F. Sherman, *Class Actions & Duplicative Litigation*, 62 Ind. L.J. 507 (1987) 26

Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 Loy. L.A. L. Rev. 1559 (2000) 21

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OTHER AUTHORITIES

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Analysis: Class Action Litigation, Class Action Watch, Spring 1999, *available at* http://www.fed-soc.org/Publications/classactionwatch/classvli3.pdf 22

Federalist No. 80 (Alexander Hamilton) 23

Manual For Complex Litigation (Third) (1995) ... 26, 27

1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23* (May 1, 1997) 22

3 Elliot, *Debates of the Federal Constitution* (1836) 23

14B Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 1998) 11, 13

IN THE

Supreme Court of the United States

No. 01-896

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA) N.A.,

Petitioners,

v.

JOHN B. MCCAULEY, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") respectfully submits this brief as *amicus curiae* in support of petitioners and urges reversal of the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its member companies, or its counsel, made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), a letter of consent to file this brief from respondents has been filed with the Clerk of the Court; petitioners have filed with the Court a blanket consent for all *amici*.

The NAM is the oldest and largest multi-industry trade association in the United States. The NAM represents 14,000 member companies and subsidiaries (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The NAM and its member companies are vitally interested in the proper application of the federal diversity statute to a relatively small, but exceedingly important group of lawsuits filed against out-of-state manufacturers seeking broad injunctive relief on behalf of plaintiff classes. At bottom, the NAM believes that a plaintiff's unilateral decision to proceed via class action rather than individually should have no bearing on whether there is federal jurisdiction in such cases. That is especially true in class-action cases which, like this one, involve requests for broad injunctive relief.

Such requests take many forms. One that increasingly arises in state-wide or nationwide toxic tort class actions is a request for medical monitoring. See, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 603 (1997) (alleging, *inter alia*, medical monitoring claim). Medical monitoring often involves a court-administered fund, which finances not only the costs associated with periodic medical examinations, but also the costs of court-mandated studies on the long-term effects of a toxic substance or product in question, and research regarding related conditions.[2] Such relief thus

[2] This Court, of course, has been skeptical of medical monitoring and has limited its effect in cases arising under the Federal Employer Liability Act. *Buckley v. Metro-North Commuter R.R.*, 521 U.S. 424, 438-39 (1997) (assuming that "an exposed plaintiff can recover related reasonable medical monitoring costs [as an element of damages] if and when he develops symptoms," but holding that medical monitoring costs do not represent a "separate negligently caused economic 'injury'" for which a defendant may recover even if he has no current "disease or symptoms"). Nevertheless, medical monitoring relief has been sought in a number of different types of mass tort actions. *See, e.g.*, *Petito* v. *A.H. Robins Co.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 1999) (pharmaceutical product); *Amchem*, 521 U.S. at 597 (exposure to asbestos); *Ayers* v. *Township of Jackson*, 525 A.2d 287 (N.J. 1987) (groundwater contamination); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (exposure to PCBs).

requires not only a court-administered fund, but also the appointment of (and adequate compensation for) a fund administrator and an advisory panel of qualified and knowledgeable individuals that will devise a comprehensive medical monitoring plan. See, *e.g.*, *Petito* v. *A.H. Robins Co.*, 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) (holding that court in equity may create, supervise, and implement medical monitoring plan in action against manufacturer of Fen-Phen). The costs of compliance with such relief, if it is available under state law, undoubtedly would exceed the jurisdictional amount, even if the remedy were limited to the cost of the administration components of the fund. Accordingly, a claim for injunctive medical monitoring relief should satisfy the amount-in-controversy requirement.

Other class-action plaintiffs sometimes seek court-ordered safety programs. See, *e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 139 (3d Cir. 1998); see also *In re Three Mile Island Litig.*, 557 F. Supp. 96, 97 & n.1 (M.D. Pa. 1982); *Ganim* v. *Smith & Wesson Corp.*, 780 A.2d 98, 117 (Conn. 2001) (seeking injunctive relief against gun manufacturer in form of funding for "programs focused on handgun safety and owner responsibility"). In *General Motors*, for example, a plaintiff class brought several actions in both state and federal court against the manufacturer of pick-up trucks alleging that they had a defectively designed fuel system. 134 F.3d at 137. As part of a proposed settlement in state court, plaintiffs sought—and defendant agreed to—defendant-funded "safety programs, researching the safety of general fuel systems and testing proposed retrofits for safety and feasibility." *Id.* at 139. These proposed programs purportedly would cost a total

of $5.1 million. *Id.* (explaining that injunctive relief would result in research and testing for retrofits); see also *In re Three Mile Island Litig.*, 557 F. Supp. at 97 (noting that approved settlement included fund for "evacuation planning for the future").

Another category of lawsuits affected by the decision below are cases seeking an injunction ordering the defendant to remove a toxic substance from a common area enjoyed by multiple plaintiffs or plaintiff class. See, *e.g.*, *Lane* v. *Champion Int'l Corp.*, 844 F. Supp. 724, 727 (S.D. Ala. 1994); *Anderson* v. *W.R. Grace & Co.*, 628 F. Supp. 1219, 1232 (D. Mass. 1986). In *Lane*, for example, the plaintiff class consisted of individuals who owned property adjoining a bay in which the defendant released toxic substances from its paper mill. 844 F.Supp. at 726. Part of the relief sought by the class was an injunction "to force the defendants to clean up and remove from [the bay] all toxins and other pollutants they had released there." *Id.* at 727 (ordering remand for lack of jurisdiction only after plaintiffs amended complaint to exclude request for injunctive relief). Such relief would satisfy the jurisdictional minimum if the costs of cleanup to the defendant exceeded $75,000.[3]

Finally, some class-action plaintiffs have sought damages and injunctive relief in the form of corrective advertising. In *Earnest* v. *General Motors Corp.*, 923 F. Supp. 1469 (N.D. Ala. 1996), for example, the plaintiff class alleged that the defendants designed and installed defective engines and engine control modules in their automobiles, and requested injunctive relief that included an "advertising campaign to notify putative class members of the alleged defect." *Id.* at 1471. There too, if the cost of implementing the advertising

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[3] *See also Anderson* v. *W.R. Grace & Co.*, 628 F. Supp. 1219, 1232-33 (D. Mass. 1986) (request for injunction ordering defendant to remove hazardous substances previously dumped on plaintiffs' property, and all contamination from area groundwater).

campaign exceeded $75,000, the jurisdictional amount would be satisfied.

Given the size and significance of the claims involved, these cases often spawn parallel suits in other states and subject out-of-state manufacturers to multiple lawsuits that must be defended simultaneously across the country. Although the relative number of such cases is small, the cost to defendants of complying with the broad injunctive relief sought can amount to millions and sometimes billions of dollars.

As demonstrated below, such cases are properly resolved in federal court. They are precisely the types of claims that the Constitution contemplated would be the province of federal courts, and for which the diversity statute was intended.

STATEMENT OF THE CASE

As is clear from Petitioners' statement of the case (with which *amicus* agrees), the essential facts are that the respondents in this case brought a class-action suit in state court seeking broad injunctive relief against the petitioners, Ford Motor Company and Citibank. The suit claims that the petitioners acted unlawfully in terminating a particular credit-card rebate program. In addition to seeking compensation for individual plaintiffs, the plaintiffs seek an injunction that, among other things, would require Ford and Citibank to reinstate the program essentially as it existed prior to its termination. Although the total costs of that reinstatement would vary to some extent depending on the number of plaintiffs (and others) choosing to participate, it is undisputed that the reinstatement would impose fixed costs well in excess of the statutory $75,000 minimum for diversity jurisdiction. Those fixed costs would be incurred even if only a single plaintiff ultimately participated in the program.

On appeal, the Ninth Circuit ruled that these fixed costs could not be considered in determining whether the statutory minimum had been met, and therefore ruled that the case

must be remanded to state court. The Ninth Circuit acknowledged that, if the suit had been brought by a single plaintiff, then these costs would be sufficient to satisfy the statutory minimum. J.A. 113. However, relying upon its earlier precedents, the court ruled that—because the suit was brought on behalf of a class of many plaintiffs—the petitioners could satisfy the statutory minimum only by showing, as to each class member, that the fixed costs *divided by the number of class members*, plus the amount sought by that class member individually, exceeded the statutory minimum. J.A. 116-119. Because petitioners had not made this showing, the court held that they had failed to establish a sufficient basis for diversity jurisdiction. *Id.* at 118-119.

SUMMARY OF ARGUMENT

I. This Court's settled precedent makes clear that a claim by a plaintiff class for injunctive relief that would impose on the defendant fixed compliance costs exceeding $75,000, regardless of the number of plaintiffs joining the action in which that claim is raised, satisfies the amount-in-controversy requirement imposed by 28 U.S.C. § 1332(a).

This case is controlled by the principle, reflected in Federal Rule of Civil Procedure 82 ("Rule 82"), that procedural rules can neither "extend" nor "limit" federal jurisdiction. Put another way, the Federal Rules of Civil Procedure, including Rule 23, are jurisdictionally "neutral." Here, there can be no question that, if plaintiffs proceeded through individual lawsuits—rather than through a Rule 23 class action—their individual requests for an injunction reinstating the rebate program would have satisfied the amount-in-controversy requirement.

Under settled law, the amount in controversy in a case involving a claim for injunctive relief is the "sum or value" of that relief, which may be assessed from the perspective of the defendant. As a result, the amount-in-controversy requirement is satisfied if the injunction sought by the

plaintiff would impose on the defendant compliance costs exceeding $75,000. It is undisputed in this case that the injunction sought by the plaintiffs would impose on the defendants fixed compliance costs in excess of the jurisdictional minimum. Under settled law, moreover, where multiple plaintiffs file suit to vindicate a "common and undivided interest," the "sum or value" of each plaintiff's interest may be considered in the aggregate. Each of the plaintiffs in this case has a common and undivided interest in an injunction requiring petitioners to reinstate the rebate program at issue.

That conclusion cannot be altered by plaintiffs' decision to proceed through a class-action mechanism. As Rule 82 makes clear, because Rule 23 of the Federal Rules of Civil Procedure is a procedural provision, it can neither extend nor limit the substantive standards governing the amount-in-controversy requirement. Thus, just as the existence of a plaintiff class cannot extend diversity jurisdiction, by way of aggregation, to encompass a group of jurisdictionally deficient claims by individual defendants, see *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), so also plaintiffs' decision to proceed via a class action cannot limit federal diversity jurisdiction when each plaintiff's claim for injunctive relief independently satisfies the jurisdictional amount.

II. Contrary to the decision below, a fair application of the neutrality principle reflected in Rule 82 to cases involving claims for class-wide injunctive relief has not and will not cause the sky to fall on the federal courts. To the contrary, enforcement of Rule 82 according to its plain terms will affect only a small, but important number of class actions for which the purposes underlying diversity jurisdiction are served. Class actions brought against out-of-state defendants that seek injunctive relief requiring medical monitoring, safety programs, remediation of toxic spills, or corrective advertising campaigns are precisely the types of claims for

which the diversity provision of Article III, and every subsequent diversity statute, were designed.

First, proper application of the diversity statute and Rule 82 would not cause an influx of "state law nuisance" actions in federal court, as the Ninth Circuit suggested. Rather, counsel for plaintiffs who truly wish to remain in state court have the ability and strong incentives to limit their complaints in a way that avoids federal jurisdiction—for example, by omitting claims for broad injunctive relief where money damages would suffice. Indeed, in the context of money damages, this Court has explained that plaintiffs can avoid federal jurisdiction by waiving recovery of damages in excess of the jurisdictional amount. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938). As a result, the number of such claims ultimately litigated in federal court would likely be very small.

Moreover, the small number of cases where plaintiffs insist on seeking broad injunctive relief are precisely the types of cases for which diversity jurisdiction was designed. Indeed, the same incentives that cause plaintiffs to file suit in state court—*e.g.*, lax class certification standards applied against out-of-state defendants—are the reasons that the Constitution and Congress provided litigants the option to proceed in federal court to avoid such practices. Further, the federal courts are procedurally and institutionally well equipped to handle large class actions such as these. Not only do federal judges bring a more national perpective to such cases, but they also have the ability to coordinate and consolidate similar or identical actions pending in multiple courts and to utilize unique procedural tools permits federal courts to resolve such cases efficiently, fairly and without undue delay.

ARGUMENT

I. UNDER THE NEUTRALITY PRINCIPLE OF RULE 82, A REQUEST BY A CLASS FOR INJUNCTIVE RELIEF THAT WOULD IMPOSE FIXED COSTS IN EXCESS OF $75,000 SATISFIES THE AMOUNT-IN-CONTROVERSY REQUIREMENT, JUST AS IF THE SAME REQUEST WERE MADE BY A SINGLE PLAINTIFF OR A GROUP OF PLAINTIFFS.

This case is controlled by a single, common-sense principle that is enshrined in Rule 82 of the Federal Rules of Civil Procedure and the decisions of this Court. It is that a procedural rule or device "'shall not be construed to extend or limit the jurisdiction of the United States district courts.'" *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82). In other words, the procedural mechanisms created by the rules of civil procedure should be neutral with respect to the reach of federal jurisdiction.

The decision below both ignores and contravenes this fundamental principle. As shown below, the language of the diversity statute, as well as this Court's decisions construing it, clearly establish that the fixed costs imposed by an injunctive order can satisfy the amount-in-controversy requirement, whether the underlying claim is asserted by an individual plaintiff or a group of individual plaintiffs. What distinguishes this case from those is that this case involves a class action under Rule 23. But, under Rule 82's neutrality principle, the mere use of the class-action device cannot "'limit the jurisdiction'" of the federal courts, any more than the use of that device can "'extend'" federal jurisdiction. *Id.*

A. The Language Of 28 U.S.C. § 1332(a) And This Court's Decisions Make Clear That The Fixed Costs Of Providing Injunctive Relief Can Satisfy the Amount-In-Controversy Requirement, Whether The Claim Is Asserted By An Individual Or A Group Of Individual Plaintiffs.

The amount-in-controversy requirement is a statutory limitation on the scope of federal jurisdiction authorized by Article III of the Constitution, which provides, in pertinent part, that the "judicial Power shall extend to all Cases, in Law and Equity . . . between Citizens of different States." U.S. Const. art. III, § 2. Section 1332 of Title 28 sets forth Congress' grant of federal diversity jurisdiction and provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States.

28 U.S.C. § 1332(a). The amount-in-controversy requirement (which was a component of the first diversity statute in the Judiciary Act of 1789[4]) was designed to identify those cases involving diverse parties for which a federal forum for the resolution of interstate conflicts should be available. Unlike the federal question statute, which no longer contains an amount-in-controversy requirement, see 28 U.S.C. § 1331, the federal diversity statute recognizes that federal jurisdiction will not extend to every dispute (however trivial) between diverse plaintiffs and defendants. Rather, where the citizenship of the plaintiffs is diverse from the citizenship of the defendants, the controlling jurisdictional question is

[4] That Act conferred diversity jurisdiction on the federal courts "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars." Act of Sept. 24, 1789, § 11, 1 Stat. 78. Apart from periodic *adjustments* to the jurisdictional amount over the past two centuries, the language of this provision has undergone very few changes since 1789.

whether "the matter in controversy exceeds the sum or value of $75,000." *Id.* § 1332(a). Under Rule 82, the application of this limitation cannot depend on whether a group of plaintiffs chooses to proceed through individual lawsuits or through the use of the class-action mechanism.

1. There can be no doubt that the fixed costs of an injunctive remedy can satisfy the amount-in-controversy requirement for federal diversity jurisdiction in a suit brought by an individual plaintiff. Where a single plaintiff brings claims for specified damages, the "sum or value" of the "matter in controversy" is determined by the amount specified in the complaint. *St. Paul Mercury Indem. Co.*, 303 U.S. at 290-92 (involving removal from state court based upon diversity jurisdiction). However, where the complaint does not specify the precise amount sought, the court must assess the "sum or value" of the "matter in controversy" to determine whether it has diversity jurisdiction. See 14B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3702, at 49-52 (3d 1998).

This Court has repeatedly held that the jurisdictional amount-in-controversy requirement may be satisfied based upon claims for injunctive relief. See, *e.g.*, *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977); *Mississippi & Mo. R.R.* v. *Ward*, 67 U.S. (2 Black) 485 (1862). In so doing, the Court has explained that "the amount in controversy is measured by the value of the object of the litigation." *Hunt*, 432 U.S. at 347. In turn, the "value of the object" of any such litigation may fairly be understood as the defendant's cost of complying with an injunction sought by the plaintiffs. See, *e.g.*, *Market Co.* v. *Hoffman*, 101 U.S. 112, 113 (1879) (measuring the amount in controversy by reference to the defendant's cost of complying with an injunction sought by 206 individual plaintiffs, each of whom stood to benefit by an amount less than the jurisdictional minimum); see also *Smith* v. *Adams*, 130 U.S. 167, 175 (1889) ("[T]he pecuniary value of the matter in

dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by . . . the pecuniary result to one of the parties immediately from the judgment.").

Thus, the amount-in-controversy requirement of Section 1332(a) is clearly satisfied if a single plaintiff seeks an injunction that would require the defendant to expend more than the jurisdictional minimum in order to comply with it. See *Market Co.*, 101 U.S. at 113.

2. Moreover, where several plaintiffs join in seeking an injunction, the law is settled that the costs of complying with the injunction can satisfy the amount-in-controversy requirement to the extent those costs are fixed—that is, to the extent those costs do not depend on the presence of any individual plaintiff. As this Court has previously noted, "'when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.'" *Zahn*, 414 U.S. at 294 (quoting *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)); see also *Snyder*, 394 U.S. at 337 (same). Thus, when multiple plaintiffs bring a single claim to vindicate an undivided interest shared by the plaintiffs collectively, the "sum or value" of the entire claim may be used to measure the amount in controversy with respect to each individual plaintiff.

This basic approach is well-established in this Court's precedents. For example, in *Shields* v. *Thomas*, 58 U.S. (17 How.) 3 (1854), the representatives of a decedent's estate brought suit against the husband of the decedent's widow, alleging that the former had converted to his own use a significant portion of the property in the estate. *Id.* at 4. The plaintiffs obtained a decree requiring the defendant "to pay to each [plaintiff] the specific sum to which he was entitled, as his proportion of the property misappropriated by" the defendant. *Id.* When the defendant failed to comply with that decree, the plaintiffs obtained an injunction ordering him to

do so. *Id.* The plaintiffs moved to dismiss the appeal to this Court, arguing that, because no single plaintiff was entitled to more than $2,000.00 under the decree, appellate jurisdiction was lacking. *Id.* But the Court rejected that argument, explaining that

> [T]he matter in controversy . . . was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a *common and undivided interest* in the claim; and it was perfectly immaterial to the appellant, how it was to be shared among them. He had no controversy with either of them on that point. . . .

Id. at 4-5 (emphasis added). In so holding, the Court distinguished *Oliver* v. *Alexander*, 31 U.S. (6 Pet.) 143 (1832), where multiple plaintiffs were deemed not to satisfy the jurisdictional amount requirement because each plaintiff's "recovery d[id] not depend upon the recovery of others, but rest[ed] altogether on its own evidence and merits." *Shields*, 58 U.S. (17 How.) at 5. The *Shields* Court explained that *Oliver* was inapposite because the plaintiffs in *Shields* had a "common and undivided interest" in the subject of their claims, whereas the interests claimed by the plaintiffs in *Oliver* were "separate and distinct." *Id.* at 5.

Subsequent decisions consistently have focused on whether the plaintiffs have a "common and undivided interest," such that the "sum or value" of their claims may be considered in the aggregate, or "separate and distinct" interests, such that each plaintiff's claim must be considered individually. See, *e.g.*, *Zahn*, 414 U.S. at 294; *Snyder*, 394 U.S. at 338; see also 14B Charles Alan Wright, *supra*, § 3704, at 143-47. Like this case, many (if not most) of the cases falling into the former

category have involved claims for injunctive relief, which by their nature implicate common and undivided interests.[5]

Actions consisting of "separate and distinct" claims, by contrast, typically involve claims for money damages arising out of a single defendant's breach of several related obligations, see, *e.g.*, *Oliver*, 31 U.S. (6 Pet.) at 145-46 (admiralty suit brought by seamen to collect unpaid wages from ship owners); or claims for equitable relief that can scarcely be distinguished from claims for money damages, see, *e.g.*, *Gibson* v. *Shufeldt*, 122 U.S. 27, 39 (1887) (equitable claims that would conclusively determine the amount of money each plaintiff would recover from the defendant).

The claim at issue here—for an injunction requiring the petitioners to re-establish their credit card rebate program—obviously is not "separate and distinct" as to each plaintiff. To the contrary, regardless of other individual claims that the plaintiffs seek to assert, that particular claim vindicates a "common and undivided interest" shared by all of the plaintiffs in this case. As explained previously, every plaintiff in this case seeks precisely the same relief—a single injunction requiring the defendants to reinstate the rebate program. Although some plaintiffs ultimately may benefit from that program to a greater degree than others, the injunction itself would treat all plaintiffs equally. And it is undisputed that the injunction would impose on each defendant fixed compliance costs exceeding $75,000—costs that would not drop below the jurisdictional amount even if this action had been brought by a single plaintiff.

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[5] *See, e.g.*, *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911) (bill in equity to enforce vendor's lien); *New Orleans Pac. Ry.* v. *Parker*, 143 U.S. 42, 52 (1892) (bill in equity seeking mortgage foreclosure); *Davies* v. *Corbin*, 112 U.S. 36, 40-41 (1884) (bill to enjoin the collection of certain taxes); *Stinson* v. *Dousman*, 61 U.S. (20 How.) 461, 467 (1857) (injunction requiring specific performance under real estate contract); *Shields* v. *Thomas*, 58 U.S. (17 How.) 3, 4 (1854) (bill in equity to enforce the terms of a prior judgment).

In that sense, therefore, "the matter in controversy" here is "not the particular sum to which each [plaintiff is] entitled," but rather the class's "common and undivided interest" in having the rebate program reinstated. *Shields*, 58 U.S. (17 How.) at 4-5. Thus, the respective interests of the plaintiffs in this case are sufficiently "common and undivided" that the "sum or value" of the relief they seek may be considered in the aggregate, at least to the extent of the *fixed* costs of providing that relief.

B. Because Class-Action Procedures Cannot "Extend or Limit" The Scope Of Diversity Jurisdiction, The Amount-In-Controversy Requirement Is Satisfied By A Class Action Seeking An Injunction Whenever An Individual Suit Seeking The Same Relief Would Satisfy That Requirement.

Accordingly, there can be no serious question that the cost of complying with the respondents' proposed injunction would be considered as part of the amount in controversy if the plaintiffs all were suing the respondents as individuals rather than as part of a class pursuant to Rule 23. The only question, then, is whether the presence of a Rule 23 class action makes any difference. As shown below, it cannot, consistent with Rule 82's neutrality principle.

In the decision below, the Ninth Circuit did not dispute that an individual suit seeking the very injunctive relief sought in this case would satisfy the amount-in-controversy requirement. However, based on its analysis of this Court's decisions in *Zahn* and *Snyder*, the Ninth Circuit concluded that the presence of a class action in this case was sufficient to preclude satisfaction of that requirement. J.A. 116. Far from supporting the Ninth Circuit's conclusion, however, *Zahn* and *Snyder* logically confirm the existence of federal diversity jurisdiction in this case, particularly this Court's analysis of Rule 82.

In *Snyder*, not one of the plaintiffs sought damages in excess of the jurisdictional amount and therefore the amount in controversy for diversity jurisdiction could have been met only by aggregating the damages sought by the entire plaintiff class. 394 U.S. at 333. Similarly, in *Zahn*, although the named plaintiffs each had demonstrated that their claims exceeded the jurisdictional amount, no such showing could be made with respect to the unnamed members of the class. 414 U.S. at 292. In both cases, this Court refused to aggregate the claims of the multiple plaintiffs, and held instead that "[e]ach plaintiff in a . . . class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.'" *Id.* at 301; see *Snyder*, 394 U.S. at 336 (same).

In so doing, however, the Court carefully explained that the procedural rule governing class actions neither expanded nor limited the scope of federal subject matter jurisdiction. See *Zahn*, 414 U.S. at 299-300; *Snyder*, 394 U.S. at 336-37. Outside of the class-action context, the Court reasoned, each and every plaintiff must "individually satisfy the jurisdictional amount," *Zahn*, 414 U.S. at 292, and the class-action mechanism is merely a useful procedural tool that enables large groups of plaintiffs to join together in a single action for purposes of convenience. *Id.* at 299-300; *Snyder*, 394 U.S. at 336-37. The availability of that procedural mechanism therefore could not authorize a group of plaintiffs to maintain collectively a federal diversity suit if each plaintiff could not bring such a claim individually. *Zahn*, 414 U.S. at 299-301; *Snyder*, 394 U.S. at 336-37. To do so, the Court ruled, "would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts.'" *Snyder*, 394 U.S. at 337 (quoting Fed. R. Civ. P. 82); see *Zahn*, 414 U.S. at 299.

The facts here are the logical flip-side of *Snyder* and *Zahn*. That is, the availability of class-action procedures cannot

"limit" the subject matter jurisdiction of the courts, Fed R. Civ. P. 82, where each plaintiff in the class *could* satisfy the jurisdictional amount based upon the request for injunctive relief. In this case, therefore, in contrast to *Zahn* and *Snyder*, if any of the plaintiffs brought a separate action seeking the same injunctive relief they now seek as a class, they could have proceeded in federal court because the "sum or value" of each such action would exceed $75,000. By the same token, any such action filed in state court could properly have been removed to federal district court. See 28 U.S.C. § 1441(a).

Zahn and *Snyder* thus logically confirm that plaintiffs' decision to proceed as a class action rather than multiple individual actions does not "limit" federal subject matter jurisdiction where the federal courts would have had jurisdiction over each claim for injunctive relief if plaintiffs had sued individually. Any such "limit"—including the limitation imposed by the Ninth Circuit below—would flatly violate Rule 82.

* * * * *

The language of Section 1332 and this Court's decisions interpreting the amount-in-controversy requirement, when considered in light of Rule 82's neutrality principle, make clear that the federal diversity statute encompasses the request for injunctive relief by the plaintiff class in this case. Thus, the Ninth Circuit erred in declining to exercise jurisdiction. As Chief Justice Marshall put it more than 180 years ago:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Accordingly, respondents' efforts to limit the scope of jurisdiction conferred by the diversity statute are properly directed to Congress, not this Court.

II. APPLICATION OF RULE 82'S NEUTRALITY PRINCIPLE TO RECOGNIZE FEDERAL JURISDICTION IN CASES SUCH AS THESE SERVES THE POLICIES UNDERLYING DIVERSITY JURISDICTION WITHOUT UNDULY BURDENING THE FEDERAL COURTS.

The court of appeals refused to adhere to these principles based upon a concern that recognition of diversity jurisdiction here would unduly burden federal courts in future cases. But that concern is misplaced, both because it vastly overstates the real-world impact of Rule 82 in this context, and because it overlooks the key role that federal courts can and should play in the efficient and fair resolution of such class-action suits against out-of-state defendants.

A. Reversal Of The Decision Below Would Likely Affect Only A Relatively Small But Important Set Of Lawsuits Seeking Broad Injunctive Relief In Addition To Monetary Damages.

There is no reason to believe that a fair application of Rule 82 in cases such as these will significantly increase the burden on federal courts—if it has any such effect at all. In the first place, most of the federal courts to address this issue have disagreed with the Ninth Circuit and have found that the fixed costs of complying with an injunction can satisfy the amount-in-controversy requirement.[6] For that and other reasons, many of these suits already are being maintained in federal

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[6] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997) (explaining that correct standard is "the cost to each defendant of an injunction running in favor of one plaintiff"); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 n.16 (D. Md. 2001) ("Of course, the cost to the defendant of an injunction running in favor of one plaintiff will often be used as the test to determine the amount in controversy in class actions and other multi-plaintiff cases."); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 834-35 (E.D. Mich. 1999) (adopting the Seventh Circuit's approach *In re Brand Name*).

court. See, *e.g.*, *Gibbs* v. *E.I. DuPont De Nemours & Co.*, 876 F. Supp. 475, 480 (W.D.N.Y. 1995) (medical monitoring); *General Motors*, 134 F.3d at 139 (safety program); *Lane*, 844 F. Supp. at 727 (clean-up of toxic substance); *Earnest*, 923 F. Supp. at 1471, 1472.

As discussed in the NAM's statement of interest, these cases include class actions seeking injunctive relief in the form of "medical monitoring," "safety programs," "clean-up" programs, and "corrective advertising." There is no evidence that such cases are creating an undue burden in other circuits.

Moreover, a ruling reversing the decision below is unlikely to affect a plaintiff's incentive to choose a federal forum rather than a state forum. Given the enormous benefits to plaintiffs in certain jurisdictions of proceeding in state court, a reversal of the decision below is much more likely to cause most plaintiffs to forgo a claim for injunctive relief rather than proceed in federal court.

Indeed, in all such suits, the plaintiffs and their attorneys ultimately control whether such cases will proceed in a federal forum or in state court. As explained in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), if a plaintiff "does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount . . . ." *Id.* at 294.

By the same token, in cases such as those at issue here, there is ample reason to believe that a plaintiff committed to brining such claims in state court would simply omit claims for injunctive relief to avoid federal diversity jurisdiction. Cf. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 399 (1987) (plaintiffs may, "by eschewing claims based on federal law, choose to have the cause heard in state court"). First, and foremost, plaintiffs may omit such claims because they believe the likelihood of succeeding on the merits is small. Many of the types of class-action equitable relief discussed above have been rejected or criticized by courts across the

country.[7] Moreover, even if the theory underlying the request for relief were viable, the right to equitable relief in such cases arises only if money damages are inadequate. Cf. *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992) ("[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief."). For example, the benefits of injunctive relief (such as the discounts on auto purchases under the credit card program in this case) often can be realized in state court through money damages.

Second, plaintiffs may choose to omit such equitable claims if they perceive an advantage in proceeding in state court rather than federal court. In federal court, for example, class actions receive exacting scrutiny. Indeed, in *Amchem Prods.* v. *Windsor*, 521 U.S. 591 (1997), this Court found that a proposed class of "hundreds of thousands, perhaps millions" of individuals who were allegedly harmed by past exposure to asbestos-related products failed to satisfy Rule 23's predominance requirement. *Id.* at 597.[8] This rigor on the part

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[7] *See, e.g., Buckley*, 521 U.S. at 439 (holding that medical monitoring costs do not under FELA represent a "separate negligently caused economic 'injury'" for which a defendant may recover even if he has no current "disease or symptoms"); *McClenathan* v. *Rhone-Poulenc, Inc.*, 926 F. Supp. 1272, 1281 (S.D.W. Va. 1996) (questioning basis of injunctive relief in form of "independent safety audits"); *Bristol Tech., Inc.* v. *Microsoft Corp.*, 114 F. Supp. 2d 59, 98 (D. Conn. 2000) (noting that courts grant requests to order corrective advertising only under certain limited circumstances), *vacated on other grounds*, 250 F.3d 152 (2d Cir. 2001); *cf. Walsh* v. *Ford Motor Co.*, 130 F.R.D. 260, 266-67 (D.D.C. 1990) (declining to certify class under Rule 23(b)(2) where money damages would "be more certain to provide real benefits to affected motorists" than the requested injunction ordering recall and retrofit of defective vehicles).

[8] The federal courts of appeals have employed equally rigorous analyses when determining whether to certify a class action. *See, e.g., Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (reversing district court's grant of class certification to a national class of cigarette

of the federal courts stands in sharp contrast to the more liberal approach toward class certification that class-action lawyers may enjoy in some state courts.

Indeed, profound concern has been expressed that the "*laissez-faire*" approach taken by many state-court judges often results in "entrepreneurial contingency fee attorneys . . . bypass[ing] the rigorous review given by federal judges and obtain[ing] certification of questionable claims and approval of outrageous settlements." Victor E. Schwartz *et al.*, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483, 499 (2000). For example, one study on class actions documented that over a two-year period, a state court in rural Alabama certified almost as many class actions (35 cases) as all 90 federal district courts did in one year (38 cases). *Id.* In addition, a practice referred to as "'drive-by' class certifications" may occur whereby some state-court judges certify classes at the request of plaintiffs' counsel before defendants have been served with a complaint or given a chance to respond. See *id.* at 501.

Such lax standards may account for the recent explosion in the number of class-action lawsuits being filed in state courts. See Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 Loy. L.A. L. Rev. 1559, 1597 (2000) (noting that the *Amchem* decision accelerated the trend of attorneys seeking "to certify settlement classes in state courts where the rules on certification are perceived to be more liberal"). According to

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smokers); *cf. In re American Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (noting that "strict adherence to Rule 23 in products liability cases involving drug or medical products which require FDA approval is especially important") (emphasis omitted); *In re A.H. Robins Co.*, 86 F.3d 364, 375-76 (4th Cir. 1996) (refusing to allow plaintiffs' attorneys to receive additional ten percent in fees from unanticipated surplus of settlement funds set aside for class members).

the Federal Judicial Conference's Advisory Committee on Civil Rules, U.S. companies have in recent years experienced a 300-1,000 per cent increase in the number of class actions filed against them, with the vast majority of them having been filed in state courts. 1 *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23*, at ix-x (May 1, 1997). This trend is confirmed by a study performed by the RAND Corporation, which concluded in 1997 that the "doubling or tripling . . . of the number of putative class actions" has been concentrated in the state court systems, "because plaintiffs . . . see increased unwillingness among federal judges to certify or sustain certification of class actions." Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (1997). Another survey conducted in 1999 revealed that while federal court class actions had increased by 340 per cent over the past decade, state-court class-action filings had increased 1,315 per cent. See *Analysis: Class Action Litigation*, Class Action Watch, Spring 1999, at 3, *available at* http://www.fed-soc.org/Publications/classactionwatch/classv1i3.pdf.[9]

For all these reasons, if this Court rules that a claim for broad injunctive relief with fixed costs in excess of $75,000 satisfies the amount-in-controversy requirement, plaintiffs with access to class-action-friendly state courts are not likely to forgo those benefits just to maintain a claim for injunctive relief. They are much more likely to forgo their claims for

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[9] A more recent study published in 2001 ("the Harvard study") examined data from the dockets of three state courts widely viewed as "class action magnets." John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 205 (2001). The results of the Harvard study confirmed that the filing of state-court class actions has increased in numbers wildly disproportionate to their populations. *Id.* at 161-62 & tbl. 1. In addition, the study found that the majority of class actions filed in all three counties were brought on behalf of nationwide classes. *Id.* at 163-64 & tbl. 2.

broad injunctive relief and focus instead on damage claims that fall below the federal threshold.

B. The Ninth Circuit's Approach Ignores The Policies Underlying Diversity Jurisdiction As Well As The Federal Courts' Unique Competence To Address Large Class Actions.

On the other hand, to the extent a plaintiff nevertheless insists on seeking broad, class-wide equitable relief against an out-of-state defendant, that is precisely the type of case that can and should proceed in federal court. In this regard, the decision below simply ignores the purposes underlying diversity jurisdiction and the federal courts' unique competence to address such cases in a fair, efficient and just manner.

1. Federal diversity jurisdiction was envisioned by the Framers and first enacted by the Congress more than 200 years ago to address concerns regarding bias and the appearance of bias in cases involving citizens of different states.

In *Federalist No. 80*, for example, Alexander Hamilton suggested that "the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens" because the federal judiciary "having no local attachments, will likely be impartial between the different States and their citizens." *Federalist No. 80* (Alexander Hamilton). James Madison echoed the view that federal diversity jurisdiction is necessary to avoid local bias. He reasoned that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them" and, as a result, a "citizen of another State might not chance to get justice in a state court, and at all events he might think himself inured." 3 Elliot, *Debates of the Federal Constitution* 486 (1836).

Consistent with these views, this Court has explained that Congress conferred diversity jurisdiction in the Judiciary Act

of 1789 "to prevent apprehended discrimination in state courts against those not citizens of the State." *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74 (1938).[10]

Federal diversity jurisdiction also serves the purpose of combating the perception of bias by out-of-state defendants. Chief Justice Marshall recognized the constitutional significance of even the perception of bias:

> However true the fact may be, that tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself entertains apprehensions of this subject, or views with such indulgence the possible fears and apprehension of suitors, that it has established national tribunals for the decision of controversies between . . . citizens of different states.

Bank of United States v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled in part on other grounds*, *Louisville, Cincinnati, & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844). Thus, federal diversity jurisdiction serves not only to protect out-of-state defendants against actual bias, but also to bolster public confidence in the dual state and federal judicial systems by addressing concerns regarding the mere appearance of discrimination in favor of local residents.

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[10] Federal courts continue to recognize the need to protect out-of-state defendants against state-court hostility through diversity jurisdiction. *See, e.g.*, *Rooney* v. *Tyson*, 127 F.3d 295, 297 n.1 (2d Cir. 1997) (recognizing that asking state court to decide case pending in federal court "would contravene the object of diversity jurisdiction of presenting the actual parties to a litigation with a neutral, federal, playing field"); *J.A. Olson Co.* v. *City of Winona, Miss.*, 818 F.2d 401, 404 (5th Cir. 1987) ("Diversity jurisdiction exists for the purpose of providing a federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant."); *Wallace* v. *HealthOne*, 79 F. Supp. 2d 1230, 1232 (D. Colo. 2000) ("The history and purpose of diversity jurisdiction is to provide a neutral forum for out-of-state parties who fear that they will be subjected to local prejudice if forced to litigate as strangers in a state court.").

Anecdotal accounts of bias against out-of-state defendants in the context of class-action litigation are, unfortunately, well documented and take a number of forms. For example, commentators report that there may be local hostility toward an out-of-state defendant by the presiding judge, who is elected by a constituency that may have a strong bias against the out-of-state company. See Brittain Shaw McInnis, *The $75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013, 1027-28 (1998) (hereinafter *McInnis*) (noting that "[i]n some instances, . . . judges can end up deciding cases that involve attorneys or parties who have made substantial contributions to their campaigns"); see also William A. Braverman, *Janus Is Not A God of Justice: Realignment of Parties in Diversity Jurisdiction*, 68 N.Y.U. L. Rev. 1072, 1083 n.50 (1993) (noting that empirical studies suggest state-judge biases against out-of-state defendants). Indeed, some commentators have underscored that "[i]n states where judges are elected, some judges may feel political pressure to approve large class-action settlements so as to project an image of looking out for consumer interests and bringing large sums of money into their jurisdictions." Schwartz *et al.*, *supra*, at 502. Diversity jurisdiction is the constitutionally prescribed antidote to these problems, whether real or perceptual.

2. To the extent such class-action cases end up in federal rather than state court, moreover, federal courts are well suited to deal with them. Indeed, federal courts offer institutional strengths that enhance their ability to resolve class-action lawsuits seeking broad (*e.g.*, nation-wide) injunctive relief efficiently and effectively—in many cases far more efficiently than their state-court counterparts.

First, the federal judiciary typically has greater resources—including human resources such as a full complement of law clerks, secretaries and satellite court personnel—than most state trial courts for handling complex class-action litigation and for coordinating and disposing of duplicative litigation

efficiently. See Edward F. Sherman, *Class Actions & Duplicative Litigation*, 62 Ind. L.J. 507, 550-51 (1987); see also Stephen Daniel Kaufmann, Comment, *"Federalizing" Class Actions: The Future of the Jurisdictional Requirements For Diversity-Based Class Actions*, 52 Ala. L. Rev. 1029, 1054 (2001) (noting that federal judges, unlike state-court judges, generally have access to several law clerks, magistrate judges and special masters). Among other things, these resources permit federal judges to focus more attention on dispositive legal or evidentiary issues, pre-trial motions for summary judgment, and other developments that may permit the disposition of cases prior to the expenditure of vast resources by both sides.

Second, Congress has empowered the federal courts to coordinate and consolidate cases that raise common factual or legal questions to promote efficient and just dispute resolution. See 28 U.S.C. § 1407(a). Specifically, § 1407(a) provides that "[w]hen civil actions involving one or more common questions of fact are pending in different [federal judicial] districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings" by the judicial panel on multidistrict litigation. *Id.* Such transfers are proper where they "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.* As the *Manual for Complex Litigation* puts it, "[o]ne of the values of multidistrict proceedings is that they bring before a single judge all of the cases, parties, and counsel comprising the litigation," and "afford a unique opportunity for the negotiation of a global settlement." *Manual For Complex Litigation (Third)* § 31.132, at 254 (1995); see also Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001, 1001 (1974) (noting that transfer and consolidation under § 1407 aimed to "achieve the objectives of eliminating conflict and duplication and assuring efficient and economical pretrial proceedings"); Carter G. Phillips et

al., *Rescuing Multidistrict Litigation From the Altar of Expediency*, 1997 BYU L. Rev. 821, 833 (1997) (hereinafter *Rescuing Multidistrict Litigation*) ("[I]n enacting § 1407, Congress chose to allow judicial efficiency to outweigh individual convenience . . . .")

The availability of multidistrict litigation (MDL) proceedings in the federal court system offers several advantages to parties in complex class actions. For one thing, this system protects class-action defendants against abusive procedural tactics employed by plaintiffs' counsel to run up the costs of litigation. John A. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J.L. & Pub. Pol'y 143, 152-53 (2001).[11]

MDL proceedings also offer numerous procedural and practical benefits. These include eliminating the need to conduct multiple productions of documents in several states and condensing discovery into a national depository in a single location. *Manual For Complex Litigation (Third)* § 31.131, at 251 (noting that the Judicial Panel considers requests for MDL "mindful that the objective of transfer is to eliminate duplication of discovery, avoid conflicting rulings and schedules, [and] reduce litigation cost"); see also *Rescuing Multidistrict Litigation*, at 823 (noting that more efficient use of pretrial judicial resources outweighs the harm to litigants).

Yet another class of benefits associated with moving state-court class actions into MDL includes the advantages that federal courts may provide to defendants generally. For example, one commentator has observed that federal courts

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[11] For example, plaintiffs' counsel often file nearly identical class actions before multiple state courts, which results in the proliferation of duplicative class action litigation in different jurisdictions. *Beisner & Miller*, *supra*, at 152-53. As a result, defendants have found themselves litigating concurrently in multiple venues, and incurring significant transaction costs. *Id.* at 153.

may be more rigorous with respect to dispositive motions and admissibility of evidence, particularly scientific evidence and expert testimony, and that state courts may be more liberal in terms of discovery and less restrictive with protective orders.[12]

* * * * *

For all these reasons, adherence to Rule 82 in this context will not substantially increase the burdens on federal courts because, in the vast majority of cases, plaintiffs and their lawyers will simply forgo broad requests for injunctive relief rather than subject themselves to federal jurisdiction. And any such cases that do wind up in federal court will be the very kinds of cases for which the diversity provisions of Article III, and the subsequent diversity statutes, were designed. From both a procedural and institutional standpoint, federal courts are well suited to handle the complexities of these large class actions, and allowing them to do so will enhance justice for all parties by promoting the efficient and fair resolution of these cases. There simply is no sound policy reason to depart from the neutrality principle of Rule 82 by allowing the class-action device artificially to restrict the scope of federal jurisdiction in cases seeking broad injunctive relief.

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[12] Mark P. Robinson, Ass'n of Trial Lawyers of Am., *MDL, Class Actions, and Competing Interests of State Litigation* 357 (2001) (CLE). Similarly, federal courts are authorized under Rule 42 of the Federal Rules of Civil Procedure to order actions consolidated into a single action "[w]hen actions involving a common question of law or fact are pending before the court." Fed. R. Civ. P. 42(a). Thus, if the class action defendant can have multiple state-court actions successfully removed and transferred to a single federal court, such actions could ultimately be consolidated into a single action before that court under Rule 42. This would bring organization, efficiency and lower litigation costs to all involved parties.

CONCLUSION

For these reasons, and those stated in petitioners' brief, the judgment of the court of appeals should be reversed.

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On Writ Of Certiorari to the United States Court Of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae. Letters granting consent to the filing of amicus curiae briefs have been filed with this Court.[1]

1 Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation of submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. ATLA's members support a right of access to the proper forum for an action. The members of ATLA, however, are concerned by any manipulation of longstanding jurisdictional requirements that would improperly remove a matter to federal court and deprive a plaintiff of his or her choice of forum for legal recourse.

SUMMARY OF THE ARGUMENT

Federal courts are courts of limited jurisdiction; those limits are established by the Constitution and the Congress. To expand jurisdiction of the federal courts to include a case or class of cases not presently within the scope of that jurisdiction must necessarily be accomplished by Congress, rather than by judicial decree.

In this diversity action, Petitioners sought removal of various state court cases in which they acknowledge that no single plaintiff has a claim that even approaches the federal jurisdictional threshold. In fact, no plaintiff has a claim that exceeds $3,500. Petitioners acknowledged that the monetary claims of the various plaintiffs could not be aggregated for the purposes of establishing jurisdiction. Instead, Petitioners suggest that the purported administrative costs of complying with the injunctive relief sought by the plaintiffs, which costs are entirely within their control and are vastly disproportionate to the monetary relief sought by any individual plaintiff, are sufficient to meet the amount in controversy requirement.

To accept Petitioners' arguments is to vitiate the jurisdictional limitations imposed on diversity actions. The consequence will be to open the federal courts to jurisdictionally deficient, even trivial claims - whether filed there by plaintiffs or removed by defendants - that include a prayer for injunctive relief. Such a result contravenes the intent of Congress in imposing a monetary threshold in federal diversity cases and does not comport with the salutary purposes of the statutes limiting the jurisdiction of the federal courts.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE THRESHOLD AMOUNT REQUIRED FOR DIVERSITY JURISDICTION WAS NOT PRESENTED ON THE FACTS OF THIS CASE

A. The Federal Courts Are Courts of Limited Jurisdiction, and this Case does not Support the Exercise of that Jurisdiction.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as *the Congress* may from time to time ordain and establish." United States Constitution, Art. III § 1. (emphasis added). "The power of federal courts to hear and decide cases is defined by Article III of the Constitution and by the federal statutes enacted thereunder." *Karcher v. May,* 484 U.S. 72, 77 (1987). Congress has the authority to define the jurisdiction of the lower federal courts "and, once the lines are drawn, 'limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Keene Corp. v. United States,* 508 U.S. 200, 207 (1993). In this case, the courts below properly recognized that they are courts of limited jurisdiction, possessing "only that power authorized by Constitution and statute . . . which is not to be

expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1993).

The jurisdictional statutes in effect at any particular time are "so much a product of the whole history of both growth and limitation of federal-court jurisdiction since the First Judiciary Act, 1 Stat. 73, they have always been interpreted in the light of that history and of the axiom that clear statutory mandate must exist to found jurisdiction." *Carroll v. United States,* 354 U.S. 394, 399 (1957). The "dominant note" in the successive statutes regarding diversity jurisdiction "is one of jealous restriction . . . [and] . . . relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business." *City of Indianapolis v. Chase Nat. Bank,* 314 U.S. 63, 76 (1941) *reh'g den.* 314 U.S. 714. Hence the statute is to be "strictly construed." *Id.* A cause of action "is to be presumed" to lie outside this limited jurisdiction, "and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1993). Federal courts have "a responsibility to police the border of federal jurisdiction." *Spielman v. Genzyme Corp,* 251 F.3d 1, 4 (1st Cir. 2001).

The jurisdictional limitations for this case are found at 28 U.S.C.A. § 1332, which provides that the district courts have original jurisdiction in diversity cases in which the "matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs."[2]

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[2] Section 11 of the Judiciary Act of 1789, 1 *Stat.* 78 fixed the requirement for the jurisdictional amount in controversy at $500. This jurisdictional amount was increased to $2,000 in 1887, to $3,000 in 1911, and to $10,000 in 1958. Thereafter, in 1988, the limit was increased to $50,000 and again, in 1996, to $75,000.

Congress has also conferred jurisdiction on the federal courts over certain cases irrespective of the amount in controversy. Those include bankruptcy, patent and copyright, postal matters, internal revenue, and civil rights actions. Should Congress see fit to alter the jurisdictional threshold amount with respect to class actions, it holds the power to do so. The assertion of the United States, participating as amicus curiae, that the "rules governing class actions have enormous consequences for the federal courts and interstate commerce" Br. of United States, at 2, is more appropriately addressed to Congress, rather than to propose to this Court a tortured interpretation of existing statutes and case law.

B. Although the Federal Courts have Expressed Differing Views Regarding the Test for Determining Whether the Jurisdictional Threshold is Reached, this Case does not Meet the Requirements of any Recognized Test.

Numerous decisions by this Court and the lower federal courts have held that the "amount in controversy for jurisdiction purposes is measured by the direct pecuniary value of the right that the plaintiff seeks to enforce or protect or the value of the object that is the subject matter of the suit." Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE JURISDICTION 3d, Sec. 3702 (1998). Generally, the determination of the amount in

controversy does not present a particular challenge; the amount or value a plaintiff seeks to gain, and that which a defendant seeks to conserve are often identical and easily ascertainable.

Where the amount in controversy is not easily ascertained, the courts have spoken somewhat "ambiguously of 'the object of the suit' in determining the amount in controversy . . . although there is support for the notion that the benefit to the plaintiff should control -- the so-called 'plaintiff viewpoint' rule." *Id.* Historically, most courts have examined the issue from the point of view of the plaintiff. Annot., "Criterion Of Jurisdictional Amount To Vest Jurisdiction Of Federal Court Where Injunction Is Sought," 30 A.L.R.2d. 602, Sec. 4(2) (1953). Petitioners contend that this case should be analyzed using the "either viewpoint" rule. Br. for Petitioners at 10-17. Under that rule, "value of the 'thing sought to be accomplished by the action' may relate to either or any party to the action." *Ridder Bros., Inc. v. Blethen,* 142 F.2d 395, 399 (9th Cir. 1944).

"In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Advertising Com'n,* 432 U.S. 333, 347 (1977). While there is a "basic agreement among the lower courts concerning what must be valued," there is a "seemingly never ending source of confusion" about how to value it in the absence of a clear definitive statement by this Court. *Hoffman v. Vulcan Materials Co.,* 19 F. Supp. 2d 475, 479 (M.D.N.C. 1998).

While acknowledging the "either viewpoint" view, the court of appeals below properly recognized the dangers inherent in applying it in the context of a

class action, noting the "inherent conflict" between the "either viewpoint rule" and the "non-aggregation rule" and suggesting that "the former must yield". *In re Ford Motor Co./Citibank (South Dakota), N.A,* 264 F.3d 952, 958 (9th Cir. 2001).

In doing so, the court of appeals did not create an improper class action exception to the "either viewpoint" rule, as asserted by one *amicus*. *See* Br. of Pharmaceutical Research and Manufacturers of America, at 12-20. Nor did the court, as claimed by another, bar class actions involving injunctive relief from federal courts. *See* Br. of Product Liability Advisory Council, at 5-8.

Rather, the Court of Appeals correctly recognized that in class actions, the jurisdictional analysis must proceed in stages:

> [The] threshold question is aggregation, and it must be resolved affirmatively before total detriment [to the defendant] can be considered. . . . Otherwise, the principle of *Snyder* and *Zahn* would be subverted, i.e., plaintiffs with minimal damages could dodge the non- aggregation rule by praying for an injunction . . . We recognized that "'[t]otal detriment' is basically the same thing as aggregation," and held that "where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief."

In re Ford Motor Co./Citibank (South Dakota), N.A., 264 F.3d 952, 959 (9th Cir. 2001) (internal citations omitted). To broaden the scope of federal jurisdiction by holding otherwise is to permit parties with minimal damages to improperly invoke the jurisdiction of the federal court simply by seeking injunctive relief. This

result does not comport with the strict construction of the limitations placed on the jurisdiction of the federal courts.

In challenging the ruling below, the Pharmaceutical Research and Manufacturers of America and the Chamber of Commerce of the United States, in their *amicus curiae* briefs, disregard the court's plain statement that if the plaintiffs in a multiple plaintiff case are asserting a right in which they have a common and undivided interest, the "either viewpoint" rule may be utilized to determine jurisdiction. *Id.*

Further, contrary to the implication of National Association of Manufacturers in their *amicus curiae* brief at 9-15, the court of appeals did not determine that the costs imposed by an injunction may never satisfy the amount in controversy requirement; only that they do not do so in this case. Additionally, the assertion by State Farm Mutual Automobile Insurance Company in its *amicus curiae* brief 6-7, that not only must the jurisdictional analysis be conducted from a defendant's point of view, but that aggregation should be permitted for defendants under circumstances in which it is not permitted for plaintiffs, is not supported by the existing law.

C. Aggregation is Not Proper in this Case.

The traditional judicial interpretation of the jurisdictional limit has been "that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." *Snyder v. Harris*, 394 U.S. 332, 335 (1969) reh'g den. 394 U.S. 1025. As the Court in *Snyder* explained, aggregation was historically permitted only:

> (1) in cases in which a single plaintiff seeks to aggregate two or more . . . claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.

Id. at 335.

The doctrine that separate, distinct claims could not be aggregated was based on the Court's interpretation of the statutory phrase "matter in controversy", and by "1916 this Court was able to say in *Pinel v. Pinel*, 240 U.S. 594 . . . that it was 'settled doctrine' that separate and distinct claims could not be aggregated to meet the required jurisdictional amount." *Id.* at 336.

The *Snyder* Court also explained that to overrule the aggregation doctrine would contradict

> [The] congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction.

Id. at 339-340.

Thereafter, this Court in *Zahn v. International Paper Co.*, 414 U.S. 291, 292-293 (1973), explained that when plaintiffs with "separate and distinct" demands unite in a single suit for convenience and economy, the demand of each must meet the jurisdictional threshold, but that when more than one plaintiff unites to enforce a "single title or right in which they have a common and undivided interest," it is sufficient for jurisdictional purposes if their interests collectively reach the jurisdictional threshold.

> This distinction and rule . . . were firmly rooted in prior cases dating from 1832, and have continued to be the accepted construction of the controlling statutes . . . The rule has been applied to forbid aggregation of claims where none of the claimants satisfies the jurisdictional amount.

Id. at 294-295[3]

"'[C]laims of several plaintiffs, if they are separate and distinct, cannot be aggregated for purposes of determining the amount in controversy.' . . . Only claims, whether related or unrelated, of a single plaintiff against a single defendant may be aggregated." *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 666 (3rd Cir. 2002). *See also, Wolde-Meskel v. Vocational Instruction Project Community Services, Inc,* 166 F.3d 59, 62 (2d Cir. 1999). In cases involving more than one defendant, a plaintiff may aggregate the amount claimed against multiple defendants "only if the defendants are jointly liable." *Middle Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001). However, "if the defendants are severally liable, plaintiff must satisfy the amount in controversy requirement against each individual defendant."

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[3] It has been suggested that it is not clear how *Zahn* is impacted by the enactment of 28 *U.S.C.A.* 1367. The Court in *In re Abbott Laboratories,* 51 *F.3d* 524, 529 (5th Cir. 1995) *aff'd by an equally divided court sub. nom. Free v. Abbott Labs.*, 529 *U.S.* 333 explained that "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in- controversy requirement, as did the class representatives." That issue, however, is not pertinent to the case presently under consideration since it is not alleged that any plaintiff individually meets the threshold for diversity jurisdiction.

Petitioners concede that "it is now well settled that in class actions – and in all cases involving multiple plaintiffs – 'the separate and distinct claims of two or more plaintiffs cannot be aggregated to satisfy the jurisdictional amount.'" Br. for Petitioners at 18. Petitioners suggest, however, that the non-aggregation rule does not bar the removal of this matter to federal court. ATLA must respectfully disagree.

1. Aggregation and the "Defendant's Viewpoint".

In *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858 (9th Cir. 2001), the Ninth Circuit explained that utilizing the "defendant's viewpoint" for purposes of determining the amount in controversy where an injunction is sought is effectively the same thing as aggregation. A defendant in *Kanter* asserted that that the value of the injunctive relief sought by the plaintiffs in the action should be determined by calculating the cost that would be incurred by the defendants to provide the injunctive relief requested by the class, and then treating that total cost as the amount in controversy with respect to one plaintiff. The defendant contended that if the court viewed the case in this fashion, the amount in controversy would exceed $75,000.

The court determined that the defendant's argument was foreclosed by its earlier decision in *Snow v. Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977). The *Kanter* court recognized that in some earlier non-class actions, the value of injunctive relief had been calculated by examining the cost of the injunction to the defendant. However, the court noted, this approach could not be applied to class actions without undermining earlier decisions of this Court holding that class action plaintiffs cannot aggregate the

amounts of "separate and distinct" claims in order to meet the amount-in-controversy requirement. 265 F.3d. at 859.

The court in *Snow* had reasoned that "if a plaintiff cannot aggregate to fulfill the jurisdictional amount requirement of § 1332, then neither can a defendant who invokes federal jurisdiction under the removal provisions of s 1441." *Id.* at 789. The *Snow* court looked to the earlier decision in *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597 (10th Cir. 1970), which addressed this issue. Although under *Snyder*, the *Lonnquist* plaintiffs could not aggregate their claims to satisfy the jurisdictional requirement, the defendants argued that, for purposes of the injunctive relief sought by the plaintiffs, the amount in controversy should be determined by the total monetary impact on each defendant. The *Lonnquist* court did not agree. It found that in cases involving separate and distinct claims that cannot be aggregated, it is not proper to look to total detriment to meet the jurisdictional requirement. *Id.* at 600.

The *Snow* court noted that the "doctrine of *Snyder* cannot be so easily evaded. The threshold question is aggregation, and it must be resolved affirmatively before total detriment can be considered." *Id.* at 789-790. In *Snow*, the court held that where the "equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation [applies] with equal force to the equitable as well as the monetary relief." *Id.* at 790. The proper focus is not determined by the type of relief sought by the plaintiff, but instead continues to depend upon the nature and value of the right asserted, which, in *Snow*, was described as the right of future consumers to be protected from allegedly deceptive advertising which

was said to injure them in an amount far below the jurisdictional minimum. *Id.* at 790-791. If the defendants were allowed to remove the case to federal court, it would mean that the plaintiffs could have filed it there initially. *Id.* .at 791. This suggests, of course, that all a plaintiff would need to successfully file jurisdictionally deficient claim in federal court is to seek injunctive relief. Such a result was not proper then, and it is not proper now.

The *Kantor* court suggested that in *Snow*, the defendant could have complied with an injunction on a plaintiff-by-plaintiff basis (handing out the correct parts to each future purchaser of the component in issue), but that the *Kantor* defendants could not readily stop selling or advertising the medication in question one consumer at a time. The *Kantor* court determined that this distinction was irrelevant since in both cases the right asserted was a "separate and distinct" right of individual class members, not a "common and undivided" right of the class as a whole. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 859-860 (9th Cir. 2001).

In those cases, as in this one, each plaintiff could sue to vindicate his or her rights as an individual and need not join a class in order to bring a cognizable claim. To permit every class action to satisfy the jurisdictional threshold by simply including an incidental request for injunctive relief would plainly contradict the goals of the amount-in-controversy requirement, "which serves both to preserve the jurisdiction exercised by the state courts and to limit the size of the diversity caseload in federal courts". *Id.* at 861.

In *Leonard v. Enterprise Rent a Car*, 279 F.3d 967, 973 (11th Cir. 2002), the court determined that for jurisdictional purposes, "the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted." *See also, Smith v. GTE Corp.*, 236 F.3d 1292, 1309 (11th Cir. 2001). The *Leonard* court noted that the monetary benefit to any one class member was well below the jurisdictional limit and explained that, while aggregating the amounts would meet the jurisdictional threshold, as with monetary relief aggregation is appropriate only when the plaintiffs endeavor to

> enforce a single title or right, in which they have a common and undivided interest," . . . "when an injunction protects rights that are separate and distinct among the plaintiffs, the value of the injunction to the individual plaintiffs may not be aggregated to sustain diversity jurisdiction." . . .In this case, the requested injunction would protect the rights of the class members that arise from their individual lease agreements with GTE. When plaintiffs assert rights that arise from individual contracts with a defendant, those rights are separate and distinct, and thus, their claims may not be aggregated.

Id. at 1309-1310. *See also, Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1271 (11th Cir. 2000) (rule against aggregating value of an injunction that protects rights separate and distinct among plaintiffs applies to claims of insureds who sue to enforce separate and distinct rights arising from respective insurance policies).

It is noted that in *Market Company v. Hoffman*, 101 U.S. (11 Otto) 112 (1879), cited by Petitioners in support of their position (Br. for Petitioners at 12-13), the jurisdictional limit was reached by aggregating the

claims of the two hundred and six complainants who sued jointly, since the relief afforded to them was a single decree in favor of them all. The Court, however, acknowledged that "if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company". *Id.* at 113.

More recently, the court in *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1420 (2nd Cir. 1997), while not deciding the issue of whether the amount in controversy may be measured by reference to the defendant when an injunction is sought, noted, "the soundness of such a jurisdictional premise is not obvious". In support of their application, Petitioners assert that a "plaintiff generally can protect itself by choosing where to commence an action". Br. for Petitioners at 14. Such "protection" is illusory if defendants are free to remove every action to federal court simply by claiming administrative or compliance costs grossly disproportionate to the recovery sought by a plaintiff.

In *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 610 (7th Cir. 1997) *cert. den. sub nom. HJB, Inc. v. AmeriSource Corp.*, 528 U.S. 1181, the defendants "argued that the clerical or ministerial costs of compliance might cause a case to meet the jurisdictional threshold". *Id.* at 609. The court noted, in language applicable here, that even if an injunction merely tells a defendant to stop engaging in illegal activity, there will be lawful costs of compliance. "Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed $50,000 for each defendant, and, if so, this would argue for allowing removal to federal court." *Id.* at 610. If such an argument were

accepted, "every case, however trivial, against a large company would cross the threshold . . . even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number. It would be an invitation to file state-law nuisance suits in federal court." *Id.* at 610.

Contrary to the assertions of the Business Roundtable in its *amicus curiae* brief at 16-18, it is respectfully suggested that the relief sought in this case would not "require some alteration in the defendant's method of doing business" so as to arguably meet the minimum amount in controversy. *Id.* at 609. This case is distinguishable from the cases cited by State Farm Mutual Automobile Insurance Company in its brief at 9-11, in which plaintiffs sought relief that necessitated actual alterations of the ongoing business methods of the insurance companies.

2. No Single, Undivided Interest in Injunctive Relief Is Found in this Case.

The "the presence of a 'common and undivided interest' is rather uncommon, existing only when the defendant owes an obligation to the group of plaintiffs as a group and not to the individuals severally". *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1262 (11th Cir. 2000). The court in *Griffith v. Sealtite Corp.*, 903 F.2d 495, 498 (7th Cir. 1990) determined that although the plaintiffs' adjudged recoveries for wages from the Panamanian Labor Court were set forth in a single document, since the underlying causes of action which plaintiffs brought were separate and distinct, the plaintiffs could not aggregate their respective awards to satisfy the jurisdictional amount. In *Sellers v. O'Connell*, 701 F.2d 575 (6th Cir. 1983), the court did not

accept the argument that because all plaintiffs were required to demonstrate the invalidity of a particular resolution, they were entitled to aggregate their claims. Plaintiffs, each of whom asserted a claim to pension benefits held in a union trust fund, did not possess a common and undivided interest in the relief sought. "An identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased. Such is not the situation here because each plaintiff seeks to receive a fixed sum under the terms of the trust instrument." *Id.* at 579.

In *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 683 (9th Cir. 1976), although the plaintiffs' trespass claims against the railroad presented common questions of both law and fact, the rights to exclude trespassers were not held by plaintiffs as a group. Instead, allotments of tribal lands were said to have been made to individual Indians "in severalty" and were made "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made". Similarly, in *Lonnquist*, the plaintiffs claimed that certain department stores owed them refunds as a result of allegedly usurious interest charges. Those claims were deemed to be separate and distinct claims that could not be aggregated, rendering it improper to look to total detriment in order to meet the jurisdictional threshold. *Lonnquist v. J. C. Penney Co*, 421 F.2d 597, 599 (10th Cir. 1970).

The exception to the rule of non-aggregation was noted in *Troy Bank of Troy, Ind., v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911), wherein the Court explained that when several plaintiffs unite to enforce a single title or right, in which they share a common and undivided interest, their interests might be aggregated

to reach the jurisdictional amount. The court in *Troy* explained that the "controlling object" of the suit was the enforcement of a vendor's lien, which was a single thing or entity in which the plaintiffs shared a common and undivided interest, and which neither was able to enforce in the absence of the other. *Id.* at 41.

Aggregation of claims had previously been allowed in a wrongful death action when the pertinent state statute created a single liability on the part of the defendant and contemplated only a single action for the benefit of the survivors of the decedent, which action might be brought by all of the interested parties or by any one of them for the benefit of all. *Texas & P. Ry. Co. v. Gentry,* 163 U.S. 353, 360-361 (1893).

Aggregation was also permitted in a quiet-title action in which certain land was divided into separate parcels, each attributed to an individual litigant. It was explained that the litigants derived their title from a common source, and that although the land in question was divided, it comprised a single tract of land, the value of which was to be considered for jurisdictional purposes. *Skokomish Indian Tribe v. France,* 269 F.2d 555, 558-559 (9th Cir. 1959). In *Phoenix Ins. Co. v. Woosley,* 287 F.2d 531, 533 (10th Cir. 1961), the court indicated that it had jurisdiction when the original plaintiff/debtor and the nine creditors to whom he had assigned part interest in the insurance proceeds in issue united to enforce the collection of insurance against two insurance companies. The original plaintiff/debtor was said to have an interest in the collection of the insurance so that the creditors could be paid. The nine creditors had a common (but not equal) interest in the collection of this insurance since it was the source from which they might collect the money due them.

The court *Black v. Beame,* 550 F.2d 815, 818 (2nd Cir. 1977), found that claims by several members of the same family to obtain family social services were common and undivided, and aggregation of their individual claims was said to be proper.. In a business context, the court in *Eagle v. American Tel. and Tel. Co.,* 769 F.2d 541, 546-547 (9th Cir. 1985), determined that the claims of minority shareholders were common and undivided since, pursuant to state law, the source of the shareholders' claims for wrongful depletion of corporate assets is the common and undivided interest each shareholder has in a corporation's assets and a right to share in dividends. Since shareholders do not own the corporation's assets, the wrongful depletion of those assets is a direct injury to the corporation and only an indirect injury to the shareholders. As a result, shareholders normally cannot recover in their individual capacities for a wrongful depletion of corporate assets.

Where, as here, the claims of several plaintiffs are "cognizable, calculable, and correctable individually," and where recovery by a single plaintiff "would not, as a legal matter, either preclude or reduce recovery by another," aggregation is not proper. "If the aggregation rule were otherwise, the amount-in-controversy requirement would be satisfied in all large-scale but small-dollar class actions in which individual litigation is difficult or impossible as a practical matter." *Gibson v. Chrysler Corp.,* 261 F.3d 927, 945 (9th Cir. 2001).

"As one court expressed the principle, the "paradigm cases" allowing aggregation of claims "are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be

adjudicated without implicating the rights of everyone involved with the res." *Martin v. Franklin Capital Corp,* 251 F.3d 1284, 1292 (10th Cir. 2001). "When plaintiffs assert rights that arise from individual contracts with a defendant, those rights are separate and distinct" and may not be aggregated. *Smith v. GTE Corp.*, 236 F.3d 1292, 1309 (11th Cir. 2001).

Contrary to the suggestion of State Farm Mutual Automobile Insurance Company in its *amicus* brief at 13-14, this case is not one in which the injunctive relief sought would arguably "benefit the putative class as a whole and not just any individual plaintiff," such as an advertising campaign, a comprehensive vehicle recall or a provision forbidding the use of defective parts, see, e.g., *Earnest v. General Motors Corp.*, 932 F. Supp. 1469, 1472 (N.D. Ala. 1996). Nor is it one in which the plaintiffs as a group seek to preclude defendants from continuing to violate various state antitrust laws, and conspiring to prevent lower-cost generic versions of a prescription heart medication from entering the United States marketplace. *See In re Cardizem CD Antitrust Litigation,* 90 F. Supp. 2d 819, 822 (E.D. Mich. 1999).

The court of appeals below correctly noted that the claims in this case, arising out of the termination of a rebate program do not implicate a "single indivisible res." Instead, these claims could clearly be adjudicated on an individual basis because the plaintiffs have no common and undivided interest in accruing rebates under the discontinued program. To the contrary, each plaintiff charged purchases to their credit cards, and accrued rebates, individually. Prior to the commencement of the litigation, they did not share any common interest. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, at 959.

The court pointed out that Petitioners accurately stated, in their memorandum opposing class certification, that the case did not "involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions." As a result, Petitioners apparently concluded that "[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims...are separate and distinct." *Id.* at 960. As a result, this case is not one in which aggregation is necessary or proper.

3. Use of Petitioners' Inflated Compliance Number Does Not Confer Jurisdiction.

Petitioners assert that even if the costs of compliance are not aggregated, they nevertheless meet the amount in controversy requirement. The court of appeals, however, correctly identified the flaw in Petitioners' assertion that because the cost of an injunction running in favor of one plaintiff would allegedly exceed $75,000, aggregating the cost of compliance is unnecessary to satisfy the jurisdictional threshold. Petitioners suggest that, although the monetary benefit to an individual plaintiff of reinstating the rebate accrual program is clearly limited and does not nearly meet the jurisdictional requirement, the cost to Petitioners of reinstating and maintaining the rebate program would be the same whether it is done for one plaintiff or for six million plaintiffs. Petitioners thus claim that since the non-aggregation rule would not be violated if their administrative costs were used to meet the jurisdictional requirement, the court could utilize the

"either viewpoint" rule to establish the jurisdictional amount. *Id.* at 960.

The United States suggests that it would "seem artificial to place the 'value' of the 'matter in controversy' at anything less than the amount at stake for either the plaintiff or the defendant, whichever is greater." Br. of United States at 12. The court of appeals, however, noted that while such an argument initially appeared to be consistent with the principle enunciated in *Snow:*

> [I]t is fundamentally violative of the principle underlying the jurisdictional amount requirement--to keep small diversity suits out of federal court. If the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, "then every case, however trivial, against a large company would cross the threshold." . . ."It would be an invitation to file state-law nuisance suits in federal court." . . .Therefore, we hold that the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000.

In re Ford Motor Co./Citibank (South Dakota), N.A., at 960-961.

The question of what constitutes the "amount at stake" is a critical one. As recognized by the court of appeals, the Petitioners' viewpoint permits a defendant to argue that if an individual plaintiff with a $12 claim prevails, it will cost them $1 million to comply with the anticipated determination of the court, thus meeting the jurisdictional threshold for removal of the suit to federal court.

Such a result contravenes the constitutional limitations on the jurisdiction of the federal courts and the attempts by Congress to limit the access to those courts. It opens those courts to virtually every class action suit without any determination by Congress that such suits properly belong in the federal courts. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, at 961. Such a result also ignores the ability of a state court to fashion a remedy that is properly responsive to a plaintiff's claim without causing a defendant to incur exorbitant costs of compliance, thereby avoiding the nightmare scenario presented by Petitioners that it will cost them millions to address claims that do not exceed $3,500.

The practical underpinnings of this case should not be disregarded. It has been said that if "the defendant can extinguish the plaintiff's entire claim by tendering $75,000 or less at the outset, then the amount 'in controversy' does not exceed $75,000." *Hart v. Schering-Plough Corp.*, 253 F.3d 272, 274 (7th Cir. 2001). Plainly that could have been done here. In determining the value of the amount in controversy, the court "must measure the amount 'not...by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated.'" *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 666 (3rd Cir. 2002).

ATLA respectfully suggests that a court should likewise not determine the value based solely on the high-end administrative costs figure provided by a party seeking federal jurisdiction. A court should instead isolate the actual core value of the dispute. As the Seventh Circuit suggested in a different context in *Caudle v. American Arbitration Ass'n*, 230 F.3d 920, 923 (7th Cir. 2000),

> [S]uppose Michael Jordan left his Ferrari in a garage, which would not return the car until he paid $10 for two hours' parking. Could Jordan get review in federal court of his contention that $10 is an 'unreasonably high fee' for such a short stay by alleging that the value of the detained car exceeds $75,000? Surely not; the real controversy concerns the difference (if any) between $10 and the proper fee for two hours' parking. By paying $10 Jordan could have his car immediately while continuing his quest for a refund.

Id. at 923.

The decision of the court of appeals in this case did not, as suggested by the National Association of Manufacturers' brief at 17, impermissibly limit federal subject matter jurisdiction. It simply recognized that such jurisdiction is necessarily limited, and found that the facts of this case did not meet the jurisdictional requirement. While Petitioners threaten "substantial confusion and protracted litigation over how to determine whether a cost is 'administrative'", and a waste of resources by judges and litigants wrestling with the extent of federal question jurisdiction, Br. for Petitioners at 23, it has long been accepted that the amount in controversy is determined by the "object of the suit." *Healy v. Ratta,* 292 U.S. 263, 268 (1934).

Further, it is clear that "objects which are merely collateral or incidental to the determination of the issue raised by the pleadings" are not considered for purposes of jurisdiction. *Id.* The appellate court could properly have determined that business decisions made solely by Petitioners about how best to comply with a determination of the court affording relief to the various plaintiffs constitute either ministerial costs of compliance or were collateral or incidental to the

determination of the issues actually raised by the pleadings.

In this case, a single plaintiff may have a claim in an amount ranging from $1 to $3,500. Petitioners assert, however, that the costs to them to address any one claim exceed $75,000 per month. Br. for Petitioners at 16. Plainly a court must determine the reasonable value of the object of the suit, and the rights and issues actually being litigated. The court of Appeals correctly did so when it found that the jurisdictional threshold had not been reached.

Contrary to the concerns expressed by some of the Petitioners' supporting *amici* in this case, the determination of the court of appeals does not improperly foreclose class actions from federal courts. It merely requires them to meet the long-established jurisdictional threshold. This case did not.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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FORD MOTOR COMPANY and
CITIBANK (SOUTH DAKOTA), N.A.
Petitioners,
v.
JOHN B. McCAULEY, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation.[1] Significantly, it is the only national public interest law firm that both prosecutes a broad range of class actions and has a special project dedicated to fighting class action abuse. TLPJ believes that Petitioners' attempt to expand the federal courts' diversity jurisdiction over class actions would violate fundamental constitutional principles, conflict with numerous decisions of this Court, endanger victims' rights, and increase the likelihood of class action abuse. Thus, it submits this brief.

SUMMARY OF ARGUMENT

Petitioners and their supporters urge this Court to radically alter its diversity jurisdiction jurisprudence in two respects: (1) to assert jurisdiction for the first time over state law class actions in which all the members of the proposed class assert only claims for modest amounts against the defendants, and (2) more fundamentally, to change its 150 year old policy of strictly construing diversity jurisdiction in deference to states' interests and the overwhelming case load of federal courts to an approach of liberally construing diversity jurisdiction in order to save major corporations from the alleged infirmity of state court class action practice. This Court should firmly reject this radical request.

Looking to Congress' multiple amendments to the

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[1] This Brief was authored solely by the *amicus* and counsel listed on the cover; no part was authored by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief pursuant to letters filed with the Clerk of the Court.

diversity jurisdiction statute to raise the jurisdictional amount, this Court long ago surmised a Congressional intent to limit federal courts to hearing only truly significant state law cases between diverse parties. The Court also long ago noted diversity jurisdiction's inherent infringement on states' constitutional right to enact statutes for the benefit of their citizens and to adjudicate disputes arising out of those statutes in their own courts.

Based thereon, this Court has always construed diversity jurisdiction narrowly, consistently holding that multiple plaintiffs asserting separate and distinct claims which do not exceed the jurisdictional amount may not aggregate those claims in order to exceed the jurisdictional amount. In other words, separate and distinct state law claims for amounts too insignificant to qualify for federal court adjudication remain so even when joined together with enough other claims that the total amount at stake for the defendant would exceed the jurisdictional minimum.

Large corporate defendants have long tried to avoid this nonaggregation doctrine by claiming that a disproportionate share of the total damages or relief requested by all of the joint plaintiffs could be recovered by any one of them in an individual suit, such that each and every plaintiff allegedly would satisfy the jurisdictional amount. They tried this initially with attorneys' fees and punitive damages, but the lower courts overwhelmingly rejected their tactic. Now, they try it with injunctive relief.

More specifically, Petitioners ask this Court to hold that the amount in controversy is satisfied if the injunctive relief sought by the named plaintiff in the context of a class action suit would cost more than $75,000 if sought by any one class member in a hypothetical individual suit. Petitioners' approach has serious and fatal flaws.

Initially, it ignores the reality of the class action suit pending before a district court in favor of a hypothetical individual suit in which the plaintiff asks for classwide, rather than individual, injunctive relief. Further, it ignores the fact that the cost of providing classwide injunctive relief is equally attributable to all members of the proposed class, not 100% to just one plaintiff and 0% to the rest.

More fundamentally, Petitioners' approach constitutes a major violation of the nonaggregation rule. It grants diversity jurisdiction over state law class actions which, in reality, constitute nothing more than the joinder of multiple very small individual suits. Accordingly, virtually any state law class action seeking injunctive relief on behalf of a significant class would satisfy the jurisdictional amount, threatening to deluge the already overburdened federal courts with a plethora of purely state law class actions.

Beyond infringing on states' constitutional prerogatives and drastically burdening federal court dockets, Petitioners' proposed standard would gut state consumer protection statutes, as many plaintiffs would forego seeking injunctive relief in order to keep their suits in state courts. Given these consequences, this Court should refuse to radically alter its diversity jurisdiction jurisprudence at the behest of large companies seeking only to gain an advantageous forum in which to defend against the claims of millions of ordinary consumers.

This Court's precedents dictate an approach far different from that advanced by Petitioners and their *amici*. To state it simply, if the defendant's cost of complying with a proposed injunction can satisfy the amount in controversy requirement, it can only do so if it exceeds $75,000 *per class member*.

Furthermore, in cases where an injunction serves as

an alternative to monetary damages, the maximum amount of recoverable damages per class member constitutes the amount in controversy for each class member, rather than the higher cost per class member to the defendant of compliance with the injunction. This is because the parties in such cases will always agree to settle for the maximum recoverable monetary damages in lieu of more expensive injunctive relief.

Petitioners also argue that purely clerical or ministerial costs of compliance with an injunction should be included in the calculation of the amount in controversy. That argument fundamentally clashes with the nonaggregation rule, however, and it would bring virtually every state law class action of any size seeking either injunctive relief or monetary damages into the federal courts.

Finally, Petitioners alternatively seek to fall into an exception to the nonaggregation doctrine for cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. Because individual relief could be granted in this case to any class member without providing relief to all class members, plaintiffs below assert separate and distinct rights, not a single right in a common and undivided interest.

ARGUMENT

I. THIS COURT'S PRECEDENTS AND FUNDAMENTAL CONSTITUTIONAL PRINCIPLES MANDATE STRICT CONSTRUCTION OF THE AMOUNT IN CONTROVERSY REQUIREMENT.

A number of Petitioners' *amici* devote considerable time to detailing the supposed evils of class action practice in

state courts and the supposed virtue of federal class action practice. *See, e.g.,* Brief of *Amicus Curiae* National Association of Manufacturers in Support of Petitioners at 20-28; Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioners at 2-3 & 8-16. They do so for the purpose of persuading this Court that it would be desirable to shift a vast number of class actions from state to federal court.

Petitioners thus unabashedly call for this Court to set aside over 150 years of its jurisprudence narrowly construing diversity jurisdiction. In *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-7 (1941), this Court succinctly summarized that jurisprudence and the good reasons for it:

> The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensibilities, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs in state courts' in order to keep them free for their distinctive federal business. [citations omitted]. 'The policy of the statute (conferring diversity upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary section of the Constitution (Article 3). …Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' [citation

> omitted]. In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy.

The deference to state governments and courts which requires the strict construction of the diversity statute does not represent mere lip service to abstract principles of federalism. Rather, it derives from the very real and concrete right and desire of states to pass laws for the benefit of their citizens and have them interpreted and implemented by their own courts which have the requisite familiarity and expertise to interpret them in accordance with legislative intent. *See, e.g., Sherwood v. Microsoft Corp.*, 91 F. Supp. 2d 1196, 1204 (M.D. Tenn. 2000) ("The state courts have an independent interest in the construction and the enforcement of Tennessee's anti-trust and consumer protection statutes. Absent a clear basis for federal jurisdiction, a Tennessee state court is the appropriate forum for such decisions.").

The other basis for the strict construction of the diversity statute--the desire not to further burden already overburdened federal courts with a wave of new state law cases--is equally concrete. As this Court noted in *Snyder v. Harris*, significant changes to the "amount in controversy" jurisprudence or to the aggregation doctrine could result in a "most noticeable" expansion of the federal case load in class actions brought on the basis of diversity of citizenship. 394 U.S. 332, 340 (1969).

In fact, that comment by the Court in 1969 constitutes a drastic understatement today. According to a Rand Institute Study, a reasonable estimate is that nearly 60% of reported class action decisions arose in state courts from 1995 to 1996. D.R. Hensler, *Class Action Dilemmas Pursuing Public Goals for Private Gain, Executive Summary* at 6 (Rand Institute for Civil Justice 1999). This represents thousands of class actions that would be shifted from state to

federal court if Petitioners and their *amici* have their way.

As part of its strict construction of the diversity statute, this Court long ago held that when two or more plaintiffs asserting separate and distinct rights of recovery join together in a single suit for convenience and economy they may not add their claims together to meet the jurisdictional minimum, but rather each must assert claims in the requisite jurisdictional amount. *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40 (1911). Only one year after the adoption of the Federal Rules of Civil Procedure, this Court applied this principle to class actions brought under Rule 23. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939). These holdings comport with Rule 82's command that the Federal Rules of Civil Procedure, including their various joinder provisions, such as Rule 23, shall not be construed to extend or limit federal jurisdiction. Fed. R. Civ. P. 82. *See Snyder*, 394 U.S. at 337.

Contrary to the principles underlying the nonaggregation rule, Petitioners and their supporters ask this Court to adopt a liberal construction of the diversity statute without regard to its history and purpose based instead on their own preference for a federal forum, a parochial interest that has no place in judicial construction of a statute. This Court should decline Petitioners' invitation to discard its long-standing conservative diversity jurisdiction jurisprudence and resolve any doubt about the proper extent of diversity jurisdiction **against**, not for, its expansion.

II. IF A DEFENDANT'S COSTS OF COMPLYING WITH AN INJUNCTION CAN BE USED TO SATISFY THE AMOUNT IN CONTROVERSY REQUIREMENT IN A CLASS ACTION, THE COST TO THE DEFENDANT HAS TO EXCEED $75,000 PER CLASS MEMBER TO DO SO.

If this Court holds that the either viewpoint rule can be used to determine the amount in controversy in a class action in which class members assert separate and distinct claims for injunctive relief, TLPJ urges the Court to make clear exactly when the defendant's costs of compliance with the injunction will satisfy the amount in controversy requirement. Specifically, the Court should hold that the cost to the defendant must exceed $75,000 *for each and every named plaintiff and absent class member*, such that the total cost of compliance divided by the total number of class members exceeds $75,000.

A. Requiring the Defendant's Costs to Exceed $75,000 Per Class Member is the Only Approach Consistent With *Snyder* and *Zahn*.

In *Snyder v. Harris*, this Court held that, under the nonaggregation rule, the separate and distinct claims of all the members of a proposed class may not be added together to meet the required jurisdictional amount where none of the named plaintiffs or absent class members individually would have a claim that exceeds the required jurisdictional amount. 394 U.S. at 339-41. Subsequently, in *Zahn v. Int'l Paper Co.*, this Court held that each named plaintiff and absent member of a proposed class must satisfy the jurisdictional amount in order for diversity jurisdiction to exist. 414 U.S. 291, 301 (1973).[2]

The necessary consequence of this rule is that a federal court may have jurisdiction over a suit brought by a plaintiff individually but not have jurisdiction over a suit

[2] In that case, the claims of each of the named plaintiffs satisfied the jurisdictional amount (as presumably did the claims of the vast majority of the proposed class), but the district court found that not every individual member of the class had suffered damages in excess of the jurisdictional amount. 414 U.S. at 292.

asserting the exact same claims brought by the exact same plaintiff as a named plaintiff on behalf of a proposed class. As the Seventh Circuit explained in *In Re Brand Name Prescription Drugs Anti-Trust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997) ("*Brand Name*"):

> But it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a defendant desiring to remove a diversity case to federal court to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case.

Indeed, under *Snyder* and *Zahn*, a federal district court would not have jurisdiction over a 100-member proposed class action in which the named plaintiff and 98 absent members of the class had separate and distinct caims of $100,000 each and one absent class member had a claim of $74,999. This principle applies equally to class actions in which class members assert separate and distinct claims for injunctive relief, and Petitioners' entire appeal constitutes nothing more than a creative attempt to avoid its consequences.

Specifically, Petitioners and their supporters argue that if a defendant's cost of compliance with an injunction as to any one named plaintiff or absent class member would exceed $75,000, considered as if that one plaintiff had brought an individual suit seeking classwide injunctive relief, then the jurisdictional amount is met. Brief for Petitioners at 18; Brief for the United States as *Amicus Curiae* Supporting Petitioners at 25. They took this proposed standard from the Seventh Circuit's opinion in *Brand Name,* 123 F.3d at 610:

> Whatever the form of relief sought, each plaintiff's claim must be held separate from

> each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated. [citation omitted]. … The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff; otherwise the nonaggregation rule would be violated.

What Petitioners and their supporters studiously avoid acknowledging, however, is that the Seventh Circuit articulated this standard in light of its prior holding that the enactment of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367, had overruled *Zahn*, such that if at least one named plaintiff satisfies the jurisdictional minimum, "…the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim …[e]ven though their own claims are for less than the jurisdictional minimum amount." *Brand Name*, 123 F.3d at 607 (*citing Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-33 (7th Cir. 1996)).

In this light, the Seventh Circuit's articulation of the rule makes at least some sense. If only one named plaintiff must satisfy the jurisdictional minimum, a court could look to see if the cost of providing injunctive relief to just that one plaintiff would exceed $75,000 if it were sought by that named plaintiff in an individual suit. The court would have supplemental jurisdiction over the remaining named plaintiffs and absent class members without regard to whether the cost of injunctive relief would exceed $75,000 for each and every

one of them in the class context.[3]

In this case, Petitioners have *stipulated* that they do not seek to have this Court revisit *Zahn*, but rather that they merely ask this Court to apply *Zahn* to class claims for injunctive relief. Reply Brief for Petitioners in Support of Certiorari at 5. Accordingly, the standard for ascertaining the amount in controversy from the defendant's viewpoint articulated in *Brand Name* cannot govern in this case in which the continued vitality of *Zahn* has not been challenged.

As set forth above, under *Zahn*, the amount in controversy must be satisfied as to each and every named plaintiff and absent class member. Crucially, this must be done in the context of the actual class action suit before the district court and the classwide injunctive relief sought in that suit, not based upon a hypothetical and highly unlikely suit in which an individual class member seeks classwide injunctive relief, as Petitioners and their supporters urge.

The facts of this case convincingly demonstrate this proposition. The named plaintiffs sought specific performance of their contracts providing for the rebate program. Should Petitioners choose to accomplish that by reinstating the original rebate program, no competent

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[3] *See Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977-8 (7th Cir. 2000) ("That means, for Del Vecchio, that the amount in controversy from the defendants' point of view is the amount they risk paying **him**, not the amount they might have to pay the entire class.") (emphasis in original); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 482 (M.D.N.C. 1998) ("The plaintiffs have each requested in excess of $30,000 in damages in addition to an injunction. Therefore, if defendant can show that the injunction is worth more than $45,000 to **any one plaintiff**, then plaintiffs' motion to remand must be denied.") (emphasis added); *Rodgers v. General Electric Capital Corp.*, 1998 WL 128675 at 4 (N.D. Ill. 1998) ("Accordingly, we must consider the cost to GECC of complying with an injunction running in favor of **Rodgers alone**.") (emphasis added).

economist or accountant would attribute the entire fixed cost of reinstating the program to one class member alone and attribute no portion of the fixed cost of reinstatement to all the other class members. Rather, he or she would divide the total fixed cost of reinstatement by the total number of class members and attribute to each class member that class member's proportionate share of the fixed cost.

That proportionate share attributable to each class member constitutes the amount in controversy for each class member under *Zahn*. Simply put, the proper method for calculating the amount in controversy for each named plaintiff and absent class member asserting separate and distinct claims for injunctive relief is to take the total cost to the defendant of compliance with the injunction and divide it by the number of members in the proposed class. Only if that results in a quotient that exceeds $75,000 has the plaintiff or removing defendant met the *Zahn* requirement that the cost of compliance with the injunction must exceed $75,000 as to each and every named plaintiff and absent class member.

Even under the Seventh Circuit's approach in *Brand Name* of determining only the amount in controversy as to one named plaintiff, the amount in controversy should be measured in the context of the actual class action case pending before the court, not in a hypothetical individual suit in which the named plaintiff inexplicably seeks classwide injunctive relief. In the context of that class action, a competent economist or accountant would, likewise, attribute to the named plaintiff an amount in controversy equal only to that named plaintiff's proportionate share of the defendant's cost of providing the classwide injunctive relief.

A number of district courts have properly applied the defendant's viewpoint of the amount in controversy in this manner. For example, in *Littleton v. Shelter Ins. Cos.*, 2000 WL 356408 at 2 (S.D. Ill. 2000), the district court took the

defendant's claimed cost of complying with the requested injunctive relief of $802,755, divided it by the approximately 541,947 class members and concluded that the cost to the defendant of injunctive relief in favor of the named plaintiff (and, consequently, to each of the absent class members) amounted to about $1.50, far less than the jurisdictional requirement.

Similarly, in *Sherwood v. Microsoft Corp.*, the district court noted that Microsoft's estimate of the cost of providing the injunctive relief sought by the plaintiffs, $58.5 million, when divided by anything more than 710 class members, would "...bring the apportionment of that total cost among each class member to less than $75,000 per class member." 91 F. Supp. 2d at 1203. Thus, that district court held that the jurisdictional amount had not been met. *Id.*

As another district court put it, "Even the Seventh Circuit, which seems to have adopted the 'either viewpoint' (i.e., plaintiff or defendant)...seems also to suggest that if the defendant's cost is considered, it must then essentially be divided by the number of potential plaintiffs." *Melnick v. Microsoft Corp.*, 2000 WL 761013 at 1 fn. 1 (D. Me. 2000) (*citing Brand Name*, 123 F.3d at 609-10). Only Petitioners and their supporters, by virtue of assessing the defendant's cost of compliance with an injunction in the context of a fictional individual suit in which the named plaintiff seeks classwide injunctive relief, would attribute the entire fixed cost of providing classwide injunctive relief to just the named plaintiff.

The fictional and improper nature of Petitioners' suggested approach of valuing the cost to a defendant of providing the relief requested in the actual class suit as if it had been brought in an individual suit by the named plaintiff is easily demonstrated. In this case, for example, it is highly unlikely that a plaintiff in an individual suit against

Petitioners would request reinstatement of the prior program set up to accrue credits for millions of people or that any court would consider this a realistic request for relief.

Rather, any plaintiff in an individual suit would request a court to order Petitioners to honor the terms of his contract by keeping track of his purchases, which would require nothing more than one employee reviewing his bills each month and keeping a running tally. Even if the plaintiff were to ask for reinstatement of the entire program, it is highly unlikely that any court would consider such a request for relief to be potentially recoverable and thus a realistic basis for calculating the amount in controversy.[4]

Consistent with this analysis, the district court in *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. 1156, 1164-5 (C.D. Cal. 1993), rejected Petitioners' exact argument as follows:

> The Court finds two flaws with this argument. First, while Smiley may have been able to bring this action as an individual, she clearly did not do so; it is undisputed that she brought the case on behalf of all other similarly situated Citibank cardholders. Moreover, if Smiley had brought an action purely on behalf of herself it is not at all clear that she could obtain the kind of sweeping injunctive relief order that she seeks here on behalf of all present and potential future Citibank cardholders.

[4] Petitioners attempt to use this argument as support for the proposition that the class members below sought to enforce a single title or right in which they had a common and undivided interest. Brief for Petitioners at 25. As set forth in Section IV below, this argument has no merit.

For that reason, the court refused to calculate the amount in controversy as to just the named plaintiff based upon the classwide injunctive relief she had requested in her actual class action suit. *Id.*

In cases like this one where the requested injunctive or other equitable relief serves as an alternative form of relief to monetary damages, the economics of settlement dictate that the amount in controversy is even less than the defendant's cost of compliance per class member. In this case, for example, they dictate that the amount in controversy does not exceed $75,000 as to any one plaintiff, much less as to each and every class member.

The maximum amount that any plaintiff or class member could recover as a result of this case would be $3,500, because that was the maximum credit allowed under the credit card program. Petitioners could, obviously, settle this case at any time by offering the maximum possible recovery, $3,500, to each and every plaintiff and class member.

Accordingly, Petitioners would never allow entry of an injunction against them that would cost them more than $3,500 per class member to implement. This demonstrates that the true amount in controversy between Petitioners and each and every plaintiff and absent class member does not exceed $3,500.[5] *See Brand Name*, 123 F.3d at 609 ("The defendant would be willing to pay the plaintiff up to a shade less than the cost that the injunction would impose on the defendant.... In that way the cost to the defendant would be

[5] Even if only the amount in controversy as to one named plaintiff was considered in this case, per *Brand Name*, basic economic theory dictates the same conclusion. Petitioners would never spend more than $3,500 to provide injunctive relief to any one named plaintiff, making that the true maximum amount in controversy.

transmuted into an equivalent value to the plaintiff."); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d at 482 ("...[I]n cases where injunctions or declaratory judgments are requested, the value of the relief could be determined by considering...how much the defendant would be willing to pay the plaintiff to be rid of the injunction.").

In summary, requiring that the defendant's cost of compliance with a proposed injunction (or the maximum settlement value of the case) must exceed $75,000 per class member is the only approach that fully comports with *Snyder* and *Zahn* and with this Court's declaration that "...the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Advertising Comm'n*, 423 U.S. 333, 347 (1977). Petitioners' approach does not, and should, therefore, be rejected.

B. A Majority of Lower Courts Have Purported to Reject the Use of the Defendant's Viewpoint in Class Action Cases, But Their Decisions Actually Constitute Examples of the Proper Application of the Defendant's Viewpoint Pursuant to *Snyder* and *Zahn*.

Most or all of the injunction class action cases purporting to refuse to apply the either viewpoint rule (because doing so would serve to bypass the nonaggregation rule of *Snyder* and *Zahn*) actually constitute examples of the proper application of the defendant's viewpoint in the class action context. The courts in those cases, consistent with the economic realities of the cases before them, correctly treated the defendant's cost of compliance per class member as the amount in controversy for diversity jurisdiction purposes.

Unfortunately, those courts then erroneously treated that cost of compliance per class member as an application of the plaintiff's viewpoint and erroneously assumed that the defendant's viewpoint would have required them to aggregate

those amounts and consider only the total cost to the defendant as the amount in controversy in violation of the nonaggregation principles of *Snyder* and *Zahn*.[6] *See, e.g., Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858-61 (9th Cir. 2001); *In Re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 960-1 (9th Cir. 2001) ("*In Re Ford*"); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993); *Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Service, Inc.*, 431 F.2d 130, 132 fn. 1 (8th Cir. 1970); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970).

In *Kanter*, 265 F.3d at 858, for example, the defendant made the exact same argument as Petitioners make herein:

> Put another way, Pfizer wants us to assume for purposes of amount in controversy that a single plaintiff seeks the injunctive relief requested by Plaintiffs, and to allocate the cost to Defendants of providing the requested injunctive relief to that one plaintiff. Pfizer contends that if we were to view Plaintiffs' case in this way, the amount in controversy would exceed $75,000.

The Ninth Circuit held that the true economic value of an injunction to each plaintiff and class member would be the cost of the allegedly ineffective medication-between $9 and $17. *Id.* at 859. It then held that accepting Pfizer's argument would mean that virtually every mass-tort class action involving an incidental request for injunctive relief could

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[6] In fact, pursuant to the plaintiff's viewpoint, the amount in controversy is measured by the **value to the plaintiff** of the injunctive or equitable relief, not the cost to the defendant of providing it. *Snow v. Ford Motor Co.*, 561 F.2d 787, 788 (9th Cir. 1977).

satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332. *Id.* at 861.

The Ninth Circuit was exactly correct. As it noted in *Snow v. Ford Motor Co.*, the same rules must apply to plaintiffs originally filing suit in federal court as to defendants removing them from state court. 561 F.2d at 791. Under Petitioners' argument, in order to avoid *Snyder* and *Zahn* and gain entry into federal court, all a plaintiff would have to do is plead for injunctive relief suitable for an entire class that would cost in excess of $75,000.

Thus, the fear expressed by many courts that adopting Petitioners' argument could inundate overburdened federal courts with state law diversity class actions involving very modest disputes is well founded. In this case, it would confer federal court jurisdiction over a class action that constitutes nothing more than the joinder of multiple suits for $3,500 or less. In *Kanter v. Warner-Lambert Co.*, the argument would have conferred diversity jurisdiction over the consolidation of multiple $9 to $17 suits. 265 F.3d at 859. In *Snow v. Ford Motor Co.*, it would have conferred diversity jurisdiction over the consolidation of multiple $11 suits. 561 F.2d at 790-1.

In *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. at 1164, the Central District of California explained well the compelling reasoning of these cases in the context of its particular facts:

> ...Smiley is seeking to protect...the alleged right of Citicorp's current and future cardholders not to have to pay the $15 late charge if they fail to pay their balance in a timely manner. The fact that plaintiff seeks a court-approved public information campaign does not through sheer alchemy transform a

> cause of action which will provide marginal benefits (in all probability, well less than $100 per class member) into a claim that meets the $50,000 amount in controversy requirement. To hold otherwise would allow any class of plaintiffs who are completely diverse from the defendants to obtain federal jurisdiction merely by seeking a injunction requiring the defendant to engage in an expensive public information campaign announcing the error of his ways.

Petitioners will undoubtedly protest that a suit that could result in them incurring expenses exceeding $75,000 in order to provide the requested injunctive relief does not constitute a trivial state law suit of the sort that the $75,000 jurisdictional amount seeks to keep out of federal court. This protestation ignores that, pursuant to the nonaggregation rule as pronounced in *Synder and Zahn*, a class action seeking millions of dollars in total damages or other relief nevertheless constitutes nothing more than the consolidation of multiple individual state law suits seeking recovery of trivial amounts.

Looking to the economic realities of this litigation, it could not be more clear that the amount in controversy as to the named plaintiffs and as to each of the absent class members does not exceed $3,500, much less $75,000. Given the absence of a federal question, this state law suit joining multiple $3,500 or less claims belongs exclusively in state court.

C. The Approach Advocated by Petitioners and *Amici* Would Severely Damage Significant Federal and State Interests.

The approach advocated herein would leave the

current federal-state balance undisturbed. In contrast, the approach advanced by Petitioners and their *amici* would significantly expand federal diversity jurisdiction with a corresponding increase in federal court cases (and a decrease in state court cases). The exact impact will, of course, depend upon a number of factors, including the extent to which plaintiffs seeking to vindicate their rights under state consumer protection statutes simply abandon requests for injunctive relief.

In many cases brought under state consumer protection statutes, plaintiffs couple an ancillary request for injunctive or other equitable relief with the primary claim for money damages. *See, e.g., Kanter v. Warner-Lambert Co.*, 265 F.3d at 859-61; *Snow v. Ford Motor Co.*, 561 F.2d at 788. To avoid removal to federal court, many plaintiffs are likely to simply omit such claims for future injunctive relief.[7] Such a trend could be devastating to the effective enforcement of state consumer protection laws.

The deceptive trade practices acts of 33 states explicitly authorize injunctive relief. Nat'l Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 8.6.2.1 (5th ed. 2001). Of the other 18 states, all but one or two allow the award of injunctive relief as a form of either "other equitable relief" or "other relief the court deems appropriate." *Id.* § 8.6.2.2.

A significant trend of plaintiffs not seeking such injunctive relief in order to remain in state court would severely diminish the effectiveness of these statutes, because injunctive relief often provides a more effective remedy to

[7] In its brief, the National Association of Manufacturers frankly admits that this is the likely result of this Court ruling in favor of Petitioners. Brief of *Amicus Curiae* National Association of Manufacturers in Support of Petitioners at 19-20.

society than damage awards, as the National Consumer Law Center explains:

> One of the potentially most effective UDAP remedies against wide spread marketplace misconduct is for a private individual to seek a court-ordered injunction preventing the seller from engaging in specified conduct in the future. A merchant may treat occasional damage awards, even if trebled or increased with punitive damages, as an acceptable cost of business, not deterring future misconduct. But a properly framed and monitored injunction can eliminate the seller's use of the challenged practice against all future customers. *Id.* § 8.6.1.

Reliance on state attorney generals to seek injunctive relief does not solve this problem, as those state officials have limited resources and their own priorities. *Id.* Indeed, recognizing that governmental enforcement alone cannot solve the problem, these statutes were specifically drafted to allow private parties to bring actions as private attorney generals on behalf of all injured members of the public and on behalf of society as a whole. *Id.*

Thus, a ruling by this Court that would discourage plaintiffs from seeking injunctive relief in order to avoid federal court jurisdiction would not only serve to destroy the effectiveness of such statutes, but would also contradict the fundamental principles underlying their enactment. Coupled with the offense to states' rights and interests and the potentially crippling increase in federal courts' caseloads that could occur, the certain damage to the enforcement of state consumer protection statutes should guide this Court to reject Petitioners' requested radical expansion of diversity jurisdiction and to affirm the decision below.

III. UNDER NO CIRCUMSTANCES SHOULD A DEFENDANT'S CLERICAL OR MINISTERIAL COSTS OF COMPLIANCE WITH AN INJUNCTION COUNT TOWARDS THE AMOUNT IN CONTROVERSY REQUIREMENT.

The discussion above has focused on how to calculate the amount in controversy from the defendant's viewpoint in a class action in which the class requests injunctive relief. Whatever standard the Court adopts, it needs to also address what costs of a defendant may be included in the calculation.

Confusingly, Petitioners argue that courts should include a defendant's "administrative costs" in the calculation of the amount in controversy. That purported category of costs has little or no meaning, however, and it clearly represents a conscious departure by Petitioners from the reasoning of *Brand Name*, which otherwise provides virtually the entire basis for Petitioners' appeal.

In *Brand Name*, the Seventh Circuit stated that there are four ways in which a request for an injunction might be thought to satisfy the amount in controversy requirement. 123 F.3d at 609. The first was the value of the injunction to the plaintiff--the plaintiff's viewpoint. *Id.* The second, third, and fourth ways are variations of the defendant's viewpoint. *Id.* at 609-10.

The second way was described by the Seventh Circuit as the cost of "some alteration in the defendant's method of doing business..." *Id.* at 609. The third way was the value to the defendant of a benefit that the plaintiff's injunction would force the defendant to forego. *Id.* at 610. The fourth way was the defendant's clerical or ministerial cost of compliance with the injunction. *Id.*

Significantly, the Seventh Circuit expressed considerable doubt as to whether clerical or ministerial costs of compliance should be included in the calculation of the amount in controversy:

> Just the cost of duplicating an injunction in a case such as this and distributing the copies to all the relevant personnel might exceed $50,000 for each defendant, and, if so, this would argue for allowing removal to federal court.... But if the argument were accepted, then every case, however trivial, against a large company would cross the threshold, whether the threshold was $50,000 or as it now is $75,000, even if the plaintiff were asking for an injunction against disclosing his unlisted telephone number. It would be an invitation to file state-law nuisance suits in federal court.

Id. It then held that it need not "bite the bullet" and decide this issue because the defendant had made no effort to quantify the internal cost of compliance with the requested injunction. *Id.*

Petitioners and their *amici* do, however, advocate counting clerical or ministerial costs of compliance in valuing the amount in controversy. Under this approach, not only would virtually any injunction against a large company cross the jurisdictional threshold, but so would many, if not most, class action damage suits against large companies. The judgments in many cases would require the defendant to draft and run a computer program on its customer database to calculate the damages for each class member and then to either credit the account of each class member or to cut a check and mail it to each class member. The cost of this could easily exceed $75,000.

Of course, the clerical or ministerial costs of complying with the injunction or of making damage payments to each class member would almost never exceed $75,000 per class member and, thus, would not satisfy the amount in controversy requirement under the standard advocated herein by TLPJ. However, under the standard urged by Petitioners and their supporters, virtually every class action requesting a large company to cease and desist from engaging in any activity or requesting payment of small amounts to a large number of class members would exceed the jurisdictional threshold, flooding the federal courts with purely state law class actions that constitute nothing more than the consolidation of multiple suits over trivial amounts.

While the Ninth Circuit's statement below that it would not consider "fixed administrative costs" for purposes of calculating the amount in controversy is admittedly vague, the Ninth Circuit made the correct ruling. Plaintiffs essentially ask for nothing more than specific performance--that is, they want Petitioners to honor their contracts and to continue accruing rebates in connection with their credit card purchases. The cost of the personnel and computers to provide that very minor individual relief on a classwide basis constitutes nothing more than clerical or ministerial costs.

Indeed, the facts of this case illustrate well why counting such clerical or ministerial costs would violate the nonaggregation rule of *Snyder* and *Zahn*. As noted previously, the cost of honoring the rebate program as to only one plaintiff would be minuscule, as one employee could review a plaintiff's bills each month and keep a running tally of his credits on a sheet of paper. The cost of reinstating the original rebate program, therefore, merely constitutes the aggregation of the minuscule costs of honoring the credit card program for millions of individual class members.

IV. PETITIONERS' ATTEMPT TO BRING THIS CASE UNDER THE "COMMON AND UNDIVIDED INTEREST" EXCEPTION TO THE NONAGGREGATON RULE SHOULD BE REJECTED BY THE COURT.

Recognizing the weakness of their argument that they satisfied the jurisdictional amount in the context of a suit by class members asserting separate and distinct rights, Petitioners alternatively argue that they fall into the exception to the nonaggregation rule for "cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *See Snyder v. Harris*, 394 U.S. at 335. This Court should summarily reject this alternative argument, as the Ninth Circuit did below.

This exception has historically been limited to a very narrow class of cases in which a single plaintiff could not possibly recover relief affecting only him or her. Petitioners' requested expansion of the exception misconstrues the nature of a common and undivided interest and is at complete odds with the required strict construction of the amount in controversy requirement, thereby promising to open the floodgates of federal court to waves of new state law class actions.

Indeed, a quick survey of the *amicus* briefs filed in support of Petitioners graphically illustrates the massive influx of class actions that the federal courts can expect if this Court adopts Petitioners' argument. In addition to cases seeking injunctive relief brought pursuant to the consumer protection laws of all 50 states, Petitioners' *amici* believe Petitioners' arguments will lead to federal jurisdiction over cases where plaintiffs seek orders requiring: relabeling of products, product redesign, product repair (Brief of *Amicus Curiae* Pharmaceutical Research and Manufacturers of America in Support of Petitioners); corrective advertising,

environmental clean-up (Brief of the Product Liability Advisory Council as *Amicus Curiae* in Support of Petitioners); medical monitoring (Brief of the Business Round Table as *Amicus Curiae* Supporting Reversal); safety programs (Brief of *Amicus Curiae* National Association of Manufacturers in Support of Petitioners); and compliance with state insurance regulations (Brief of *Amicus Curiae* State Farm Mutual Automobile Insurance Company in Support of Petitioners).

Class members seek to enforce a single title or right in which they have a common and undivided interest when that interest cannot be adjudicated without implicating the interests of each and every class member. *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997). In other words, if the subject matter of the suit could be adjudicated on an individual basis, the class members have no common and undivided interest in the subject matter of the suit. *Id.*

The paradigm case of multiple plaintiffs seeking to enforce a single title or right in which they have a common and undivided interest involves a single indivisible res, such as an estate, a piece of property (the classic example) or an insurance policy. *Id.* It can also include cases in which a class of persons has a collective right to recover a fund of money from a defendant (subject to later distribution to the class, the terms of which distribution may be the subject of litigation between the class members), but no individual class member has a right to recover any particular part of the fund or any particular amount of money from the defendant. *See, e.g., Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 314-15 (1st Cir. 1969).

The classic example of the latter type of case is a shareholder's derivative action or a suit against a trustee in which the sum recovered would be paid into a corporate treasury or trust estate for later proportionate distribution. *Id.*

at 315. *See, e.g., Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 546-7 (9th Cir. 1985). In such cases, a shareholder or trust beneficiary has no right to recover any specific amount because he or she holds only a common and undivided interest in the corporation's or trust's assets. *Gilman v. BHC Securities, Inc.*, 104 F.3d at 1423.

One last category of cases involving a common and undivided interest is where plaintiffs join to seek abatement of a continuing nuisance. *Packard v. Provident Nat'l Bank*, 994 F.2d at 1050 fn. 14. *See, e.g., Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d at 42-3. In those cases, as well, relief cannot possibly be granted solely to the named plaintiff, but not to the other members of the class, because abatement of the nuisance as to the plaintiff abates it as to all class members.

As the Ninth Circuit held, this case clearly does not fall into any of these categories. *In Re Ford*, 254 F.3d at 959-60. As that court noted, the named plaintiffs and absent class members had no common and undivided interest in accruing rebates under the credit card program; each plaintiff charged purchases and accrued rebates individually pursuant to individual contracts, not as part of a group. *Id.* As noted previously, the requested injunctive relief of continuing to accrue credits, up to a maximum of $3,500, based upon credit card purchases could easily be provided to an individual plaintiff without providing similar relief to other persons or class members.

Petitioners will undoubtedly protest that regardless of what could have been done on an individual basis, the named plaintiffs in this case allegedly specifically pled for reinstatement of the entire program, which program would necessarily benefit the entire class. Crucially, however, every single court which has considered the issue has held that the nature of the underlying claim, rather than the

specific relief requested by the plaintiff, must be examined to determine whether it potentially could be vindicated individually or could only be vindicated in the context of providing relief to an entire class. *Kanter v. Warner-Lambert Co.*, 265 F.3d at 859-60; *In Re Ford*, 264 F.3d at 959-60; *Packard v. Provident Nat'l Bank*, 994 F.2d at 1050 fn. 14; *Snow v. Ford Motor Co.*, 561 F.2d at 790 ("Given *Snyder*, the proper focus in this case is not influenced by the type of relief requested, but rather continues to depend upon the nature and value of the right asserted.").

To focus on the specific relief requested, rather than the nature of the underlying claim, would lead to anomalous results. Even Petitioners would concede that the proposed class' monetary damages claims constitute the assertion of separate and distinct rights. How then can the proposed class' injunctive claims (really claims for specific performance asserted as an alternative to monetary damages) constitute the assertion of a single right in a common and undivided interest? Petitioners do not attempt an explanation. Nor could they.

Two cases present facts indistinguishable from the facts of this case. In *Kanter v. Warner-Lambert Co.*, the plaintiff sought an injunction requiring Pfizer to either change the formulation of its product to become effective (i.e., to stop selling an ineffective product) or to disclose on the label that the product is not effective. 265 F.3d at 859. Obviously, Pfizer could not easily stop selling or advertising its lice medication one consumer at a time. *Id.*

Significantly, the Ninth Circuit did not rest its decision on the specific relief requested. Rather, it looked to the nature of the right asserted by the plaintiffs, which was the right to be protected from allegedly deceptive advertising, and it found that each plaintiff could sue to vindicate that right as an individual without joining the other members of

the class in order to bring a cognizable claim. *Id.* at 860. As a consequence, it held that the plaintiffs asserted separate and distinct individual rights, not a single right in a common and undivided interest. *Id.*

In *Smiley v. Citibank (South Dakota), N.A.*, the plaintiffs sought an affirmative injunction requiring Citibank to provide a statewide advertising and public information campaign warning all California residents regarding its illegal late payment charges. 863 F. Supp. at 1164. The district court found that the right that plaintiffs sought to vindicate, the right of Citicorp's current and future cardholders not to be forced to pay a $15 late charge if they failed to pay their balances timely, constituted a separate and distinct right capable of individual vindication and that the mere fact that the plaintiffs sought a court-approved public information campaign did not convert the plaintiffs' rights into a single right in a common and undivided interest. *Id.*

The exact same reasoning applies even more forcibly in this case. The named plaintiffs and absent class members could individually sue for specific performance of their rights under their individual contracts with Petitioners. Petitioners could provide that relief to any one plaintiff without providing it to all the other class members. Thus, plaintiffs have asserted only separate and distinct rights in this case, not a single right in a common and undivided interest.

Petitioners also argue that the unlikelihood that a court would grant the classwide relief of requiring them to reinstate their entire credit card program in an individual suit brought by one plaintiff demonstrates that class members sought to enforce a single right and title in a common and undivided interest. Once again, Petitioners fail to distinguish between the specific relief requested by plaintiffs and the nature of their underlying claims, which properly controls the analysis.

Finally, by making this argument, Petitioners contradict their own pleadings. As the Ninth Circuit noted in *In Re Ford*, 264 F.3d at 960, when it was to their advantage in this litigation, Petitioners took the exact opposite position:

> As Ford and Citibank correctly stated in their memorandum opposing class certification, '[t]his case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions.' They concluded that '[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims…are separate and distinct.'

Petitioners had it right the first time. Simply put, this class action does not meet the requirements for federal court jurisdiction.

CONCLUSION

Wherefore, Trial Lawyers for Public Justice, as *Amicus Curiae* in support of Respondents, respectfully requests this Court to affirm the ruling of the Ninth Circuit that the federal district court below did not have diversity jurisdiction over Respondents' claims.

Respectfully Submitted,

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